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**The Office of the United Nations High Commissioner for Refugees  
Statement on Membership of Particular Social Group and  
the Best Interests of the Child in Asylum Procedures**

*Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union  
in the case of K., L. v. Staatssecretaris van Justitie en Veiligheid (C-646/21)*

## **1. Introduction**

1.1. On 25 October 2021, the Dutch court of ‘s-Hertogenbosch lodged a request for a preliminary ruling to the Court of Justice of the European Union (‘CJEU’) on the interpretation of Article 10(1)(d) of Directive 2011/95/EU (‘Qualification Directive’) and Article 24(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’). In essence, the Court was asked whether individuals, who have adopted ‘western’ norms, values and actual conduct during the phase of their lives in which they form their identity, should be considered members of a particular social group. The preliminary reference also asked whether and how the best interests of the child should be considered in asylum procedures.<sup>1</sup>

1.2. In this statement, the Office of the United Nations High Commissioner for Refugees (‘UNHCR’) sets out its interpretation of the concept of particular social group and the principle of the best interests of the child. Following this introductory section, Part II explains UNHCR’s interest and expertise. The relevant legislation is outlined in Part III, while Parts IV and V provide UNHCR’s interpretation of the legal issues raised by the preliminary reference. Part VI concludes by summarizing UNHCR’s position on these questions.

## **2. UNHCR’s interest and expertise in the matter**

2.1. The United Nations General Assembly has entrusted UNHCR with the mandate to provide international protection to refugees and, together with governments, seek solutions for them.<sup>2</sup> UNHCR fulfils this mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees.<sup>3</sup> UNHCR’s supervisory responsibility is also provided for under EU law, both in primary and secondary legislation. Article 78(1) of the Treaty on the Functioning of the European Union (‘TFEU’) stipulates that a common policy on asylum, subsidiary protection and temporary protection ‘*must be in accordance with the [1951] Convention*’<sup>4</sup> and Article 18 of the Charter states that ‘*the right to asylum shall be guaranteed with due respect for the rules of the [1951] Convention*’.<sup>5</sup>

2.2. EU secondary law expressly recognizes the specific role and expertise of UNHCR. The Qualification Directive affirms that consultations with UNHCR ‘*may provide valuable guidance for Member States when determining refugee status*’.<sup>6</sup> Similarly, Directive 2013/32/EU (‘Asylum Procedures Directive’) specifically refers to UNHCR’s supervisory responsibility and requires Member States to allow UNHCR to present its views

<sup>1</sup> Court of ‘s-Hertogenbosch, The Netherlands, Request for a preliminary ruling in the case of K., L. v. Staatssecretaris van Justitie en Veiligheid (C-646/21), 29 March 2022: [curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-646/21&jur=C](https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-646/21&jur=C). The preliminary reference contains also some questions concerning national grounds for legal stay, which will not be addressed by this statement.

<sup>2</sup> United Nations General Assembly (UNGA), *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V): [www.refworld.org/docid/3ae6b3628.html](https://www.refworld.org/docid/3ae6b3628.html), para. 1.

<sup>3</sup> *Ibid.*, para. 8(a). UNGA, *Convention relating to the Status of Refugees*, 28 July 1951, UNTS, vol. 189: [www.refworld.org/docid/3be01b964.html](https://www.refworld.org/docid/3be01b964.html), p. 137, Article 35; UNGA, *Protocol relating to the Status of Refugees*, 31 January 1967, UNTS, vol. 606: [www.refworld.org/docid/3ae6b3ae4.html](https://www.refworld.org/docid/3ae6b3ae4.html), p. 267, Article II.

<sup>4</sup> European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01: [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF), Article 78(1).

<sup>5</sup> European Union, *Charter of Fundamental Rights of the European Union*, OJ C 326, 26 October 2012: [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT), pp. 391–407, Article 18.

<sup>6</sup> European Union, *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 L 337, 20 December 2011: [eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095), pp. 9–26, Recital 22.

regarding individual asylum applications ‘at any stage of the procedure’.<sup>7</sup> EU legislation and the CJEU have accordingly considered that UNHCR’s documents ‘are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention’.<sup>8</sup> In relation to the preliminary questions at hand, UNHCR refers the Court to its ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’,<sup>9</sup> its ‘Guidelines on International Protection No. 2 on Membership in a Particular Social Group’<sup>10</sup> and its ‘Guidelines on International Protection No. 8 on Child Asylum Claims’.<sup>11</sup>

### 3. Relevant legal framework

#### 3.1. International and European Union law

3.1.1. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (‘1951 Convention’) is grounded in Article 14(1) of the 1948 Universal Declaration of Human Rights, which recognizes that ‘everyone has the right to seek and to enjoy asylum from persecution’.<sup>12</sup> Article 1A(2) of the 1951 Convention comprehensively defines who is a refugee<sup>13</sup> and provides that the term applies to any person who:

*‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or [...] unwilling to avail himself of the protection of that country’*<sup>14</sup>

3.1.2. This definition is essentially replicated in Article 2(d) of the Qualification Directive,<sup>15</sup> which sets out common minimum standards for recognising applicants for international protection as refugees within the meaning of Article 1A(2) of the 1951 Convention.<sup>16</sup>

3.1.3. In relation to the definition of the concept of particular social group, Article 10(1)(d) of the Qualification Directive states that ‘a group shall be considered a particular social group where in particular:

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<sup>7</sup> European Union, 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 L 180, 26 June 2013: [eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032), pp. 60-95, Article 29.

<sup>8</sup> CJEU, Fifth Chamber, *Mohammed Bilali v. Bundesamt für Fremdenwesen und Asyl*, C-720/17, 23 May 2019: [curia.europa.eu/juris/liste.jsf?num=C-720/17](http://curia.europa.eu/juris/liste.jsf?num=C-720/17), para. 57. This was restated in CJEU, Grand Chamber, *L.W. v. Bundesrepublik Deutschland*, C-91/20, 9 November 2021: [curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-91/20](http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-91/20), para. 56. See also, CJEU, Grand Chamber, *Commission v. Hungary*, C-808/18, 17 December 2020: [curia.europa.eu/juris/liste.jsf?num=C-808/18](http://curia.europa.eu/juris/liste.jsf?num=C-808/18), para. 115 and CJEU, Fourth Chamber, *Zuheyra Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-528/11, 30 May 2013: [curia.europa.eu/juris/liste.jsf?num=C-528/11&language=EN](http://curia.europa.eu/juris/liste.jsf?num=C-528/11&language=EN), para. 44.

<sup>9</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019: [www.refworld.org/docid/5eb474b27.html](http://www.refworld.org/docid/5eb474b27.html). The UNHCR Handbook and Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff and has been found by many judicial authorities to be a ‘highly relevant authority’ (*Chan v. Canada* (M.E.I.), [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, [www.refworld.org/cases/CAN\\_SC.3ae6b68b4.html](http://www.refworld.org/cases/CAN_SC.3ae6b68b4.html) at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do> at pp. 713-714), a ‘highly persuasive authority’ (*R v. Secretary of State for the Home Department*, Ex parte Adan, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, [www.refworld.org/cases/GBR\\_HL.3ae6b73b0.html](http://www.refworld.org/cases/GBR_HL.3ae6b73b0.html)), providing ‘significant guidance’ (*Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, [www.refworld.org/cases/USSCT.3ae6b68d10.html](http://www.refworld.org/cases/USSCT.3ae6b68d10.html)) and ‘should be accorded considerable weight, in light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention’ (*Al-Sirri (FC) v Secretary of State for the Home Department*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, [www.refworld.org/cases/UK\\_SC.50b89fd62.html](http://www.refworld.org/cases/UK_SC.50b89fd62.html) at para. 36).

<sup>10</sup> See UNHCR, *Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002: [www.refworld.org/docid/3d36f23f4.html](http://www.refworld.org/docid/3d36f23f4.html).

<sup>11</sup> See UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009: [www.refworld.org/docid/4b2f4f6d2.html](http://www.refworld.org/docid/4b2f4f6d2.html).

<sup>12</sup> UNGA, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948: [www.refworld.org/docid/3ae6b3712c.html](http://www.refworld.org/docid/3ae6b3712c.html), Article 14(1).

<sup>13</sup> The 1967 Protocol relating to the Status of Refugees removed the geographic and temporal limits on the 1951 Convention.

<sup>14</sup> The refugee definition includes also those individuals who, not having a nationality and being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fear, are unwilling to return to it.

<sup>15</sup> See Article 2(d) of the Qualification Directive, note 6 above.

<sup>16</sup> See Recitals 23-25 and 49 of the Qualification Directive, note 6 above.

- *members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
- *that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.*<sup>17</sup>

3.1.4. The 1989 Convention on the Rights of the Child ('CRC') provides in its Article 3(1) that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.<sup>18</sup> The CRC further provides the right of children to be heard 'in any judicial and administrative proceedings affecting the child'.<sup>19</sup> The principle of the best interests of the child is echoed in Article 24(2) of the Charter and it is restated in Article 20(5) and Recital 18 of the Qualification Directive, as well as Recital 33 and Article 25(6) of the Asylum Procedures Directive.

## 3.2. Dutch law and practice

3.2.1. In 2018, the Dutch Council of State ruled in two judgments that asylum applicants claiming to have adopted 'western' norms and customs during their stay in the Netherlands generally do not qualify for international protection.<sup>20</sup> More specifically, the Council stated that women, who became 'westernized' during their stay in the Netherlands, cannot be considered as members of a particular social group under the 1951 Convention. However, the Council held that 'westernization' may be considered as a persecution ground, if the applicant makes it plausible that the 'Western' behaviour is an expression of a religious or political conviction.<sup>21</sup> Moreover, an applicant may be considered to be in need of international protection if a characteristic, which the applicant cannot (or cannot be asked to) change, will lead to persecution based on an imputed Convention ground. The Council of State added that the applicant's behaviour in the country of origin, the applicant's age at the time of departure, the development of the applicant in the Netherlands and the length of stay on the national territory are relevant elements to take into consideration.

3.2.2. Internal instructions issued by the Dutch Immigration and Naturalization Service to its asylum caseworkers state that in general 'westernization' is not a ground to qualify for international protection.<sup>22</sup> For instance, 'westernized' women may be expected to adapt to the norms prevailing in the country of origin. Only those applicants, who can prove that upon return they will be considered as 'westernized' due to an immutable characteristic, or that their 'westernization' is connected to a fundamental political opinion and/or religious belief, may be recognized as refugees.

3.2.3. As far as the principle of the best interests of the child is concerned, the Netherlands signed and ratified the CRC in 1995. Draft legislation introducing an obligation to assess and take into consideration the best interests of the child in all procedures for legal residency, including asylum procedures, has been pending in

<sup>17</sup> Article 10(1)(d) of the Qualification Directive further states: '*Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group*'.

<sup>18</sup> UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS Vol. 1577: [www.refworld.org/docid/3ae6b38f0.html](http://www.refworld.org/docid/3ae6b38f0.html).

<sup>19</sup> According to Article 12 CRC, '*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*'.

<sup>20</sup> Council of State, The Netherlands, ECLI:NL:RVS:2018:3736, 21 November 2018: [www.raadvanstate.nl/@111724/201704575-1-v2/](http://www.raadvanstate.nl/@111724/201704575-1-v2/) and ECLI:NL:RVS:2018:3737, 21 November 2018: [www.raadvanstate.nl/@111722/201700575-1-v2/](http://www.raadvanstate.nl/@111722/201700575-1-v2/).

<sup>21</sup> According to the Dutch Council of State, '*the main rule is that a mere Western lifestyle developed in the Netherlands cannot lead to refugee status. The exception to this is the situation in which a foreign national makes it plausible that the Western behavior is an expression of a religious or political conviction. An example of this is a foreign national who makes it plausible that she has turned away from her religion and behaves in a Western manner for that very reason. In that case, such Western behavior does fall under the protection offered by refugee law on the basis of the grounds for persecution of religious and political beliefs*' (Council of State, The Netherlands, ECLI:NL:RVS:2018:3736, 21 November 2018: [www.raadvanstate.nl/@111724/201704575-1-v2/](http://www.raadvanstate.nl/@111724/201704575-1-v2/), para. 5.8).

<sup>22</sup> Immigration and Naturalization Service, *Werkinstructie 2019/1: Het Beoordelen van Asielaanvragen van Verwersterde Vrouwen*, 2019: [puc.overheid.nl/ind/doc/PUC\\_9908660000\\_1/1?solrID=PUC\\_9908660000\\_1\\_1&solrQ=verwestering](http://puc.overheid.nl/ind/doc/PUC_9908660000_1/1?solrID=PUC_9908660000_1_1&solrQ=verwestering).

Parliament since 2016.<sup>23</sup> In this context, the Dutch Council of State contended that Article 3(1) CRC does not contain a standard on the weight to be given to the child's best interest that is directly applicable.<sup>24</sup>

3.2.4. UNHCR and other stakeholders have expressed concerns over the lack of consideration of the best interests of the child in Dutch asylum procedures, in particular relating to the lack of individual examination and assessment of the best interests of the child concerned.<sup>25</sup>

#### 4. Preliminary reference questions: the adoption of 'western'/non-conforming norms, values and actual conduct and membership in a particular social group

##### 4.1. Membership in a particular social group as a ground of persecution

4.1.1. For an applicant for international protection to be granted refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in Article 1A(2) of the 1951 Convention, i.e. race, religion, nationality, political opinion or membership of a particular social group. Regarding the inclusion of membership of a particular social group in the refugee definition, it is important to recall that there is no closed list of what may constitute such groups under Article 1A(2).<sup>26</sup> The 1951 Convention does not include specific examples of social groups, and its ratifying history is silent on which groups might qualify under this ground. As reported in the *travaux préparatoires*, the Swedish delegate to the 1951 Conference highlighted that *'experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft convention made no provision for such cases, and one designated to cover them should accordingly be included'*.<sup>27</sup>

4.1.2. In UNHCR's view, the term particular social group should be read in an evolutionary manner, taking into consideration the diverse and changing nature of groups in different societies and in light of the development of international and European human rights law.<sup>28</sup> In the words of Lord Hoffmann in the *Islam and Shah* judgment issued by the House of Lords of the United Kingdom on 25 March 1999:

*'the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.'*<sup>29</sup>

4.1.3. An analysis of legislative and jurisprudential developments across States Parties to the 1951 Convention shows that this remains the Convention ground with the least clarity.<sup>30</sup> Regulations, judicial decisions, and policies have adopted different – sometimes conflicting – interpretations of what constitutes a social group within the meaning of the 1951 Convention.<sup>31</sup>

<sup>23</sup> Initiatiefvoorstel-Ellemeet, Piri, Jasper van Dijk en Teunissen: *Verankeren belang Kind in Procedure tot Verkrijgen van een Verblijfsvergunning*, [https://www.eerstekamer.nl/wetsvoorstel/34541\\_initiatiefvoorstel\\_ellemeet](https://www.eerstekamer.nl/wetsvoorstel/34541_initiatiefvoorstel_ellemeet).

<sup>24</sup> Council of State, The Netherlands, ECLI:NL:RVS:2016:2727, 19 October 2016:

<https://www.raadvanstate.nl/uitspraken/@105443/201604049-1-v3/#highlight=ECLI%3aNL%3aRVS%3a2016%3a2727>.

<sup>25</sup> See UNHCR, *In de Eerste Plaats een Kind*, April 2019: [www.unhcr.org/nl/wp-content/uploads/sites/93/UNHCR-Children-First-2019-screen-1.pdf](http://www.unhcr.org/nl/wp-content/uploads/sites/93/UNHCR-Children-First-2019-screen-1.pdf). See also the material published by the Advisory Council on Migration in October 2020:

[www.adviesraadmigratie.nl/publicaties/publicaties/2020/10/02/wetsadvies-initiatiefvoorstel-van-wet-wijziging-vreemdelingenwet-in-verband-met-verankeren-van-het-belang-van-het-kind](http://www.adviesraadmigratie.nl/publicaties/publicaties/2020/10/02/wetsadvies-initiatiefvoorstel-van-wet-wijziging-vreemdelingenwet-in-verband-met-verankeren-van-het-belang-van-het-kind); as well as the report published by the Dutch NGO, Defence for Children, in February 2021: [defenceforchildren.nl/actueel/nieuws/migratie/2021/belang-kind-in-vreemdelingenwet-moet-ontwikkelingsschade-bij-kinderen-voorkomen/](http://defenceforchildren.nl/actueel/nieuws/migratie/2021/belang-kind-in-vreemdelingenwet-moet-ontwikkelingsschade-bij-kinderen-voorkomen/).

<sup>26</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 3.

<sup>27</sup> UNGA, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 19 November 1951: [digitallibrary.un.org/record/696251?ln=en](http://digitallibrary.un.org/record/696251?ln=en), p. 14.

<sup>28</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 3.

<sup>29</sup> House of Lords, United Kingdom, *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, 25 March 1999: [publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm](http://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm).

<sup>30</sup> See Michelle Foster, *The Ground with the Least Clarity: a Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012: [www.refworld.org/docid/4f7d94722.html](http://www.refworld.org/docid/4f7d94722.html).

<sup>31</sup> To date, two main approaches have dominated the interpretation of this Convention ground. First, the 'protected characteristics' approach examines whether a group is united by an immutable characteristic or by a characteristic that is so intrinsically related to human dignity that a person should not be compelled to forsake it. Second, the 'social perception' approach examines whether or not

4.1.4. In this context, the CJEU has clarified that, in order to identify a particular social group under Article 10(1)(d) of the Qualification Directive, two cumulative conditions must be satisfied:

*‘First, members of that group must share an ‘innate characteristic’, or a ‘common background that cannot be changed’ or share a characteristic or belief that is ‘so fundamental to identity or conscience that a person should not be forced to renounce it’. Second, that group must have a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’.*<sup>32</sup>

4.1.5. The first condition includes not only characteristics which are historical and cannot be changed, but also characteristics that should not be changed because they are closely linked to the identity of the individual and/or constitute the expression of a fundamental right.<sup>33</sup> For instance, in *X, Y and Z*, the CJEU has affirmed that ‘a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it’.<sup>34</sup>

4.1.6. The second condition addresses the question of whether the identified group is perceived as a cognizable group in that society. For instance, the French Council of State has considered victims of human trafficking as members of a particular social group, because they were perceived not only by the trafficking network but also by the surrounding society and institutions as having a different identity.<sup>35</sup>

4.1.7. A particular social group cannot be defined exclusively by the persecution that members of the group suffer but persecutory actions toward a specific group may be a relevant factor in determining the perception of a group in a society. They may even lead to the identification of a particular social group within that society. As illustrated by the High Court of Australia:

*‘Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group’.*<sup>36</sup>

4.1.8. The definitions provided by the 1951 Convention and EU law do not include any additional requirements. In order to qualify under the refugee definition, members of a particular group are not expected to know each other or associate with each other as a group. Similarly, it is not necessary that members of the group publicly identify themselves as belonging to the group or that all members of the group are at risk of persecution.<sup>37</sup>

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certain individuals share a common characteristic, which makes them a cognizable group or sets them apart from society at large. UNHCR’s well-established position on this interpretative issue is that, given the varying approaches - and the protection gaps which can result - the two interpretations should be reconciled. Therefore, it would be appropriate to apply these approaches alternatively and not cumulatively (See UNHCR, *Guidelines on International Protection No. 2*, note 10 above, paras 11-12). However, in light of the text of Article 10(1)(d) and of the jurisprudence of the CJEU on this issue (see, *inter alia*, CJEU, Fourth Chamber, *Minister voor Immigratie en Asiel v. X, Y and Z v. Minister voor Immigratie en Asiel*, Joined Cases C-199/12 to C-201/12, 7 November 2013:

[curia.europa.eu/juris/liste.jsf?num=C-199/12](http://curia.europa.eu/juris/liste.jsf?num=C-199/12), para. 45), the present statement will not be based on the alternative approach, and it will rather follow the cumulative approach outlined by this Court. Indeed, analyses under the two approaches may frequently converge, as groups whose members are targeted based on a protected characteristic are also often perceived as a social group in their societies.

<sup>32</sup> CJEU, Second Chamber, *Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Oglu Ahmedbekov v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, 4 October 2018: [curia.europa.eu/juris/liste.jsf?num=C-652/16](http://curia.europa.eu/juris/liste.jsf?num=C-652/16), para. 89. See also CJEU, *X, Y and Z*, note 31 above, para. 45.

<sup>33</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 12.

<sup>34</sup> CJEU, *X, Y and Z*, note 31 above, paras 46 and 70.

<sup>35</sup> Council of State, France, *Case No. 350661*, 25 July 2013: [www.conseil-etat.fr/fr/arianeweb/CE/decision/2013-07-25/350661](http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2013-07-25/350661).

<sup>36</sup> High Court, Australia, *A. and Another v. Minister for Immigration and Ethnic Affairs*, 24 February 1997:

[www.refworld.org/cases/AUS\\_HC\\_3ae6b7180.html](http://www.refworld.org/cases/AUS_HC_3ae6b7180.html). See also House of Lords, *Islam and Shah*, note 29 above; Court of Appeal, United Kingdom, *Savchenkov v. Secretary of State for the Home Department*, [1995] EWCA Civ 47, 30 June 1995:

[www.bailii.org/ew/cases/EWCA/Civ/1995/47.html](http://www.bailii.org/ew/cases/EWCA/Civ/1995/47.html), para. 28; Supreme Administrative Court, Germany, Judgment No. *BVerwG I B 54.19*, 23 September 2019: [www.bverwg.de/de/230919B1B54.19.0](http://www.bverwg.de/de/230919B1B54.19.0), para. 8.

<sup>37</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, paras 15-17. See also Council of State, France, *Case No. 332491*, 21 December 2012: [www.legifrance.gouv.fr/ceta/id/CETATEXT000027120778/](http://www.legifrance.gouv.fr/ceta/id/CETATEXT000027120778/), para. 2 and National Court of Asylum, France, Second Section, First Chamber, *Case No. 17042624 R*, 23 July 2018:

[www.cnda.fr/content/download/140308/1421691/version/2/file/CNDA%2023%20juillet%202018%20Mme%20D.%20n%C2%B017042624%20R.pdf](http://www.cnda.fr/content/download/140308/1421691/version/2/file/CNDA%2023%20juillet%202018%20Mme%20D.%20n%C2%B017042624%20R.pdf), para. 3.

4.1.9. The existence of a particular social group is also not dependent on the size of the cognizable group.<sup>38</sup> While the size of the group has sometimes been used as a basis for refusing to recognize the existence of a particular social group, this argument has no basis in fact or reason, as also the other grounds are not bound by the question of size.<sup>39</sup> For instance, governments may seek to suppress religious views that are widely shared among the population and the fact that large numbers of persons risk persecution cannot serve as a reason for refusing to grant refugee protection. This does not mean that all members of the group automatically qualify for refugee status, as applicants must still show a well-founded fear of persecution based on their membership in the particular social group and meet all other relevant criteria, including not falling under any of the exclusion grounds.<sup>40</sup>

4.1.10. In light of these considerations and in line with Article 10(d)(1) of the Qualification Directive, judicial decisions in various Member States have recognized women and girls as a particular social group, both by reason of their gender alone and where they form specific subgroups.<sup>41</sup> For instance, according to the Italian Court of Cassation, since gender is an innate characteristic or a common background that cannot be changed, women and girls that are victims of human trafficking may be considered at risk of persecution for reasons of membership in a particular social group.<sup>42</sup> Similarly, the Irish High Court found that *‘there is no question but that women, generally, or women who are subjected to gender-based violence, may constitute a particular social group for the purposes of the Convention’*.<sup>43</sup> In UNHCR’s view, women and girls are a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men, and their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>44</sup>

## 4.2 The relevance of the adoption of ‘western’/non-conforming norms, values and actual conduct in asylum procedures

4.2.1. UNHCR submits that individuals who assert their human rights, including freedom of expression and freedom of thought, conscience and religion, and are thus seen as not adhering to prevailing cultural and/or religious norms (or who have adopted a ‘western’ lifestyle) can be considered members of a particular social group, in that they share a protected characteristic and are perceived as being different by the surrounding society.

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<sup>38</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 17. See also Advocate General at the CJEU, Richard de la Tour, Opinion Case C-621/21, 20 April 2023: [curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-621/21&jur=C](https://eur-lex.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-621/21&jur=C), para. 72, where he notes there cannot be a barrier to recognition of a particular social group solely because of its size and that the concept of distinct identity of a group cannot be interpreted as entailing a quantitative assessment.

<sup>39</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002: <https://www.refworld.org/docid/3d36f1c64.html>, para. 31.

<sup>40</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, paras 17-19.

<sup>41</sup> The second sub-paragraph of Article 10(1)(d) of the Qualification Regulation makes clear that gender-related aspects are to be given due consideration for the purposes of determining membership of a particular social group. See also Recital 30 of the same Directive. As far as the case-law of European courts and tribunals is concerned, see, for example, Council for Alien Law Litigation, Belgium, *Case No. 222.826*, 19 June 2019: [www.rvv-ccc.be/sites/default/files/arr/a222826.an.pdf](https://www.rvv-ccc.be/sites/default/files/arr/a222826.an.pdf); Council for Alien Law Litigation, Belgium, *Case No. 256.782*, 18 June 2021: [www.rvv-ccc.be/sites/default/files/arr/a256782.an.pdf](https://www.rvv-ccc.be/sites/default/files/arr/a256782.an.pdf); Refugee Appeals Board, Denmark, *Judgment*, 16 January 2017, English summary: [www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content](https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content). In its recent Opinion in case C-621/21, Richard De La Tour has argued that: *‘women, solely on account of their condition as women, are an example of a social group defined by innate and immutable characteristics liable to be perceived differently by society, according to their country of origin, by reason of the social, legal or religious norms of that country or the customs of the community to which they belong’* (note 38 above, para. 72).

<sup>42</sup> Court of Cassation, Italy, First Civil Section, *Judgment No. 676*, 12 January 2022: [www.italgiure.giustizia.it/sncass/](https://www.italgiure.giustizia.it/sncass/).

<sup>43</sup> High Court, Ireland, *S.M. v. Refugee Appeals Tribunal*, [2016] IEHC 638, 9 November 2016: [www.bailii.org/ie/cases/IEHC/2016/H638.html](https://www.bailii.org/ie/cases/IEHC/2016/H638.html), para. 54.

<sup>44</sup> UNHCR, *Guidelines on International Protection No. 1*, note 39 above, para. 30. It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to accurately determine asylum claims. Even though gender is not specifically mentioned in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims (UNHCR, *Guidelines on International Protection No. 1*, note 39 above, para. 6). This approach has been endorsed by UNHCR’s Executive Committee. Similarly, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) has recommended that *“State parties should interpret the definition of a refugee in the 1951 Convention [...] in line with obligations of non-discrimination and equality: fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; classify gender-related claims under the ground of membership of a particular social group, where necessary”* (CEDAW, *General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, CEDAW/C/GC/32, 5 November 2014: [http://www.refworld.org/docid/54620fb54.html](https://www.refworld.org/docid/54620fb54.html), para. 38).

4.2.2. ‘Westernization’ is an undefined concept encompassing a significant variety of behaviours, characteristics and beliefs.<sup>45</sup> While such behaviours and values have often been labelled as ‘western’, they may actually be the expression of fundamental rights and freedoms that are internationally recognized and protected under the international bill of human rights.<sup>46</sup> Not all non-conforming behaviours and values adopted by third-country nationals outside of their country of origin are to be considered as a protected characteristic under Article 10(1)(d) of the Qualification Directive. In UNHCR’s view, in order to identify those protected characteristics, national authorities should rely on the guidance provided by international and European human rights norms and standards.<sup>47</sup>

4.2.3. By adopting this criterion, the first condition provided by Article 10(1)(d) Qualification Directive will be satisfied if those behaviours, characteristics and beliefs are the expression of rights and freedoms protected by human rights instruments, like the Charter of Fundamental Rights. The exercise of human rights, such as freedom of movement, freedom of expression or freedom of thought, conscience and religion, is so intrinsically related to human dignity that applicants cannot be forced to renounce them, or to conceal their expression upon return. Similarly, the adoption and enjoyment of human rights and values that represent the foundations of the European Union – especially in a stage of life in which individuals are forming their identity – constitute a common background that cannot be changed or cannot be required to be changed. This is particularly true in relation to asylum applications submitted by children, adolescents and youth.<sup>48</sup>

4.2.4. As far as the second condition expressed by Article 10(1)(d) is concerned, individuals who assert their human rights and who, in doing so, are seen as not adhering to prevailing cultural and/or religious norms may be perceived as a cognizable group by the surrounding society. For example, in certain communities, women and girls that contravene social mores and traditional gender roles may be regarded as different from the surrounding society and, as such, may be considered members of a particular social group.<sup>49</sup>

4.2.5. From a procedural perspective, applicants are not required to demonstrate that they are perceived as different and considered as belonging to a particular social group.<sup>50</sup> In principle, the burden of proof in asylum procedures rests on the applicant but the duty to ascertain and evaluate all relevant facts of the case is shared between the applicant and the asylum authorities.<sup>51</sup> Even though Member States may require applicants to substantiate their claim, national authorities must assess the relevant elements of the application.<sup>52</sup> These general rules apply to all asylum claims, including those based on non-conforming behaviours, characteristics and beliefs.

4.2.6. Since the Court has been asked whether ‘*the requirement that Westernisation can lead to refugee status only if it stems from religious or political motives [is] compatible with Article 10 of the Qualification Directive*’, it should be recalled that persecution can arise from a single ground or a combination thereof. They are not

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<sup>45</sup> See, for instance, Supreme Administrative Court, Austria, *Case No. 2014/20/0017*, 28 May 2014:

[www.ris.bka.gv.at/Dokument.wxe?Abfrage=Wvgh&Dokumentnummer=JWT\\_2014200017\\_20140528L00](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Wvgh&Dokumentnummer=JWT_2014200017_20140528L00).

<sup>46</sup> In the context of refugee status determination, the term ‘westernization’ has been criticized by many commentators and practitioners due to the fact that characteristics labelled as ‘western’ may reflect behaviors that are not unique to Western societies but rather express values and beliefs contrary to the prevailing cultural and religious mores, including in regard to gender roles and behavioral codes, which are prevalent in the country of origin. For a global reflection on human rights, western values and universalism, see, *inter alia*, Michael Freeman, *Universalism of Human Rights and Cultural Relativism*, in Sheeran, Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge Taylor & Francis Group, 13 December 2013; Bertrand G. Ramcharan, *Contemporary Human Rights Ideas. Rethinking theory and practice*, Routledge Global Institutions, Second Edition, 2015, Chapter 4; Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Third Edition, Oxford University Press, September 2014, Chapter 4.

<sup>47</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 6.

<sup>48</sup> See UNHCR, *Guidelines on International Protection No. 8*, note 11 above, paras 48-51.

<sup>49</sup> See also, for example, Special Appeal Committee, Greece, *Judgment No. 95/126761*, 26 June 2011:

[www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%2095126761.pdf](http://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%2095126761.pdf), concerning an Iranian woman victim of domestic violence, where the Committee found that her non-conformity with the traditional norms and practices of Islam demonstrated her membership of a particular social group. See also Supreme Court, Spain, *Judgment No. 6426/2011*, 6 July 2012:

[www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a1969112928109cec1704d777a3a29180cde](http://www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a1969112928109cec1704d777a3a29180cde) and Supreme Court, Spain, *Judgment No. 1789/2009*, 15 June 2011:

[www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a1969112928109cec1704d777a3a29180cde](http://www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a1969112928109cec1704d777a3a29180cde).

<sup>50</sup> CJEU, Third Chamber, *P.I. v. Migracijos departamentas prie Lietuvos Respublikos vidaus reikalų ministerijos*, C-280/21, 12 January 2023: [curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-280/21&jur=C](http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-280/21&jur=C), para. 38.

<sup>51</sup> See Article 4 of the Qualification Directive. See also CJEU, Third Chamber, *N.B. and A.B. v. Secretary of State for the Home Department*, C-349/20, 3 March 2022: [curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-349/20](http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-349/20), para. 64. See also UNHCR, *Handbook*, note 9 above, para. 196.

<sup>52</sup> CJEU, First Chamber, *M.M. v. Minister for Justice, Equality and Law Reform of Ireland*, C-277/11, 22 November 2012: [curia.europa.eu/juris/document/document.jsf?docid=130241&doclang=en](http://curia.europa.eu/juris/document/document.jsf?docid=130241&doclang=en), para. 65.

mutually exclusive and frequently overlap.<sup>53</sup> For instance, depending on the circumstances of the case, a young woman at risk of persecution because of her refusal to wear traditional clothing may be recognized as a refugee due to her imputed political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), her religion (if her conduct is based on a belief opposed by religious authorities)<sup>54</sup> and/or membership in a particular social group (if her conduct is based on the exercise of human rights like freedom of expression). However, there is no requirement that membership of a particular social group be linked or connected to the other grounds or reasons for persecution. In UNHCR's view, an interpretation that excludes the possibility of applying one of the Convention grounds to claims based on non-conforming behaviours, characteristics and beliefs would be at variance with the 1951 Convention.

4.2.7. In conclusion, in UNHCR's view, applicants who assert their human rights and are thus seen as not adhering to prevailing socio-cultural and/or religious norms can satisfy the cumulative conditions under Article 10(1)(d) of the Qualification Directive.<sup>55</sup> This is particularly true for asylum claims submitted by children, adolescents and youth, who have developed such a common background or shared characteristic during an identity-forming phase of their lives.<sup>56</sup> As a consequence, the requirement that such behaviours, characteristics and beliefs can lead to refugee status only if they stem from religious or political motives - and not membership of a particular social group, or other persecution grounds - is neither compatible with the 1951 Convention, nor with EU law.

## **5. Preliminary reference questions: assessing the best interests of the child in asylum procedures**

### **5.1 The principle of the best interests of the child and its assessment**

5.1.1. The principle of the best interests of the child is codified in EU law by Article 24(2) of the Charter, which gives children the right to have their best interests assessed and taken into account as a primary consideration in all actions that affect them directly or indirectly. This provision translates in the EU legal framework the obligations contained in Article 3(1) CRC. The Grand Chamber of the CJEU has underlined their crucial relevance in the case of *V.M.A. v. Stolichna obshtina, rayo "Pancharevo"*.<sup>57</sup>

5.1.2. In its General Comment No. 14, the United Nations Committee on the Rights of the Child ('the Committee') has made clear that the principle is a threefold concept, which constitutes a crucial tool for the implementation of all the rights of the child. First, it represents a substantive right, providing children with the right to have their best interests taken into account as a primary consideration. Second, it constitutes a legal principle, according to which, if a provision is open to more than one reading, the interpretation which most effectively serves the child's best interests should be chosen. Third, it is a rule of procedure, requiring that every decision-making process affecting children includes an evaluation of its impact on the child (or children) concerned, that specific procedural guarantees are applied in practice and that the final decision shows how these

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<sup>53</sup> UNHCR, *Handbook*, note 9 above, para. 66-67. See also Council for Alien Law Litigation, Belgium, *Case No. 278 800*, 13 October 2022: [www.rvv-ccc.be/sites/default/files/arr/a278700.an.pdf](http://www.rvv-ccc.be/sites/default/files/arr/a278700.an.pdf).

<sup>54</sup> UNHCR, *Guidelines on International Protection No. 2*, note 10 above, para. 4.

<sup>55</sup> See, *mutatis mutandis*, Executive Committee of the High Commissioner's Programme ('ExCom'), *Conclusion No. 39 (XXXVI)*, 18 October 1985, [www.refworld.org/docid/5a2ead6b4.html](http://www.refworld.org/docid/5a2ead6b4.html): 'States [...] are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as 'a particular social group' within the meaning of Article 1A(2)'.

<sup>56</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 50. On this point, it must be recalled that academic studies on developmental psychology have confirmed the importance of adolescence in the determination of individual identity. According to the seminal work of Erik H. Erikson, the main and most important developmental task for adolescents between 12 and 18 years of age is to solve the 'identity versus role confusion' crisis, to construct their own unique sense of identity, and to find the social environment where they can belong to and where they can create meaningful relationships with other people (see Erik H. Erikson, *Identity, Youth and Crisis*, W. W. Norton & Company, March 1969). James Marcia has famously expanded on Erikson's work, suggesting that adolescents move from and toward four different identity statuses in order to achieve their own identity by the end of adolescence or young adulthood (see James Marcia *et al.*, *Ego Identity: A Handbook for Psychosocial Research*, Springer Science & Business Media, 6 December 2012).

<sup>57</sup> CJEU, Grand Chamber, *V.M.A. v. Stolichna obshtina, rayo "Pancharevo"*, C-490/20, 14 December 2021, [curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-490/20&jur=C](http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-490/20&jur=C), para. 63: '[s]ince Article 24 of the Charter [...] represents the integration into EU law of the principal rights of the child referred to in the Convention on the rights of the child, which has been ratified by all the Member States, it is necessary, when interpreting that article, to take due account of the provisions of that convention'. See also CJEU, Tenth Chamber, *M.A. v. État belge*, C-112/20, 11 March 2021, [curia.europa.eu/juris/liste.jsf?language=en&num=C-112/20](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/20), paras 36-38.

interests have been explicitly considered.<sup>58</sup>

5.1.3. The principle of the best interests of the child and the other rights stipulated in the CRC apply to all children without discrimination. This means that Article 24(2) of the Charter applies not only to children who are citizens of a Member State, but to all children, including asylum-seeking, refugee and migrant children.<sup>59</sup> UNHCR has repeatedly underlined the crucial importance of this norm, and more broadly of the CRC, in the protection of child and adolescent refugees.<sup>60</sup>

5.1.4. The assessment of the best interests of the child consists in evaluating and subsequently balancing all the elements necessary to make a decision in a specific situation for each individual child. Among the elements to be taken into account, the Committee has identified the views of the children, their family and close relationships, their safety and protection, their development and identity needs. The content of each element will vary from child to child and from case to case, depending on the type of decision and on the circumstances of the case, as will the relevance of each element in the overall assessment.<sup>61</sup> Best interests' considerations are rarely determined by a single, overriding factor and their assessment may involve identifying the best of several competing options.<sup>62</sup> This is a complex balancing exercise, that consists in weighing different elements with the aim of ensuring the full enjoyment of the rights enshrined in the CRC and supporting the holistic development of the child.

5.1.5. Assessing the child's best interests should be undertaken in each individual case. It will involve gathering information from the child in a manner that is child-friendly, interviewing and recording the views and observations of the child's parents, caregivers and others close to the child, and gathering other information that is relevant to the child's case.<sup>63</sup> All such information must be systematically documented and securely stored.<sup>64</sup> The determination of the child's best interests will involve balancing the different elements through the application of strict procedural safeguards and guarantees. Such safeguards include, *inter alia*, allowing children to express their own views, having well-trained professionals establishing the facts relevant to the particular case, ensuring children are assigned legal representation, requiring an adequate motivation of the decision, establishing and implementing effective review mechanisms, and assessing the impact of the decision on the rights of the child.<sup>65</sup>

5.1.6. The best interests of the child can sometimes conflict with the interests of other persons or groups and Article 3(1) CRC does not exclude the possibility of considering these elements in the assessment and determination of the best interests of a child. However, only rights-based considerations may be balanced with best interests' considerations.<sup>66</sup> According to General Comment No. 6, factors related to general migration control or the immigration status of the child, such as the lawful residence of the child, are not rights-based and cannot thus override best interests' considerations.<sup>67</sup> In addition, applying by analogy the legal principles expressed by this Court in family reunification cases, elements related to the duration of the asylum procedure, or to the lack of implementation of the removal by a Member State, should not affect this assessment and determination, as they would make the children's rights dependent on '*random and unforeseeable circumstances, entirely attributable to the competent authorities and courts of the Member States concerned*' in violation of the principles

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<sup>58</sup> UN Committee for the Rights of the Child, *General Comment No. 14 on the Right of the Child to have his or her Best Interests taken as a Primary Consideration* (art. 3, para. 1), CRC/C/GC/14, 29 May 2013: [www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](http://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf), para. 1.

<sup>59</sup> UN Committee for the Rights of the Children, *General Comment No. 6 Treatment of Unaccompanied and Separated Children outside their Country of Origin*, 1 September 2005: [www2.ohchr.org/english/bodies/crc/docs/gc6.pdf](http://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf), para. 12.

<sup>60</sup> See ExCom, *Conclusion No. 84*, 17 October 1997, [www.refworld.org/docid/3ae68c68c.html](http://www.refworld.org/docid/3ae68c68c.html); *Conclusion No. 59*, 13 October 1989, [www.refworld.org/docid/3ae68c4398.html](http://www.refworld.org/docid/3ae68c4398.html); *Conclusion No. 47*, 12 October 1987, [www.refworld.org/docid/3ae68c432c.html](http://www.refworld.org/docid/3ae68c432c.html); and *Conclusion No. 107*, 5 October 2007, [www.unhcr.org/publications/conclusion-children-risk](http://www.unhcr.org/publications/conclusion-children-risk).

<sup>61</sup> UN Committee for the Rights of the Child, *General Comment No. 14*, note 58 above, para. 80.

<sup>62</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, May 2021: [www.refworld.org/docid/5c18d7254.html](http://www.refworld.org/docid/5c18d7254.html), p. 47.

<sup>63</sup> *Ibid.*, pp. 75 and 87.

<sup>64</sup> *Ibid.*, p. 110.

<sup>65</sup> UN Committee for the Rights of the Child, *General Comment No. 14*, note 58 above, paras 88-99.

<sup>66</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, note 62 above, p. 52.

<sup>67</sup> UN Committee for the Rights of the Child, *General Comment No. 6*, note 59 above, para. 86.

of equal treatment and legal certainty.<sup>68</sup>

5.1.7. In this context, the Committee has highlighted that, even in individual cases, national authorities must motivate, justify and explain in the legal reasoning of the decision how the child's best interests have been assessed and taken as a primary consideration:

*'States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.'*<sup>69</sup>

## 5.2 Applying the best interests of the child to asylum procedures

5.2.1. As indicated by the well-established case-law of the CJEU, the principle of the best interests of the child applies to all decisions, actions and procedures that impact on children both directly or indirectly.<sup>70</sup> According to General Comment No. 14, all institutions whose work affects children's rights - including asylum and judicial authorities<sup>71</sup> - are required to take the child's best interests into account as a primary consideration.<sup>72</sup> At the same time, both the Qualification and the Asylum Procedures Directive clarify that the principle enshrined in Article 24(2) of the Charter specifically applies to asylum procedures.<sup>73</sup> In this context, the child's best interests must be taken into account both in procedural and substantive terms.

5.2.2. First, the best interests of the child apply as a rule of procedure. Refugee status determination must be conducted in accordance with the child's age, maturity and specific needs, adopting the necessary procedural safeguards.<sup>74</sup> Asylum procedures should be accessible to children without discrimination, conducted in a conducive environment by skilled staff. During the asylum procedure, children should be accompanied by a supportive adult. In the case of unaccompanied and separated children, a guardian must be appointed immediately and free of charge, as recently restated by the European Court of Human Rights in the case of *Darboe and Camara v. Italy*.<sup>75</sup> Moreover, national authorities should provide children with all necessary information in a language and in a format they can understand. As underlined by the Finnish Supreme Administrative Court,<sup>76</sup> children's

<sup>68</sup> CJEU, Third Chamber, *B.M.M. and Others v État belge*, Joined Cases C-133/19, C-136/19 and C-137/19, 16 July 2020, [curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-133/19](https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-133/19), para. 43. See also CJEU, Second Chamber, *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, C-550/16, 12 April 2018, [curia.europa.eu/juris/liste.jsf?num=C-550/16](https://curia.europa.eu/juris/liste.jsf?num=C-550/16), para. 55.

<sup>69</sup> UN Committee for the Rights of the Child, *General Comment No. 14*, note 58 above, paras 6(c) and 97.

<sup>70</sup> See, *inter alia*, CJEU, First Chamber, *T.Q. v. Staatssecretaris van Justitie en Veiligheid*, C-441/19, 14 January 2021, [curia.europa.eu/juris/liste.jsf?num=C-441/19](https://curia.europa.eu/juris/liste.jsf?num=C-441/19), para. 45; CJEU, Fourth Chamber, *M.A. and Others v. Secretary of State for the Home Department*, C-648/11, 6 June 2013, [curia.europa.eu/juris/liste.jsf?num=C-648/11](https://curia.europa.eu/juris/liste.jsf?num=C-648/11), paras 57-59. For an overview of the CJEU case-law on the best interests of the child, see Eleonora Frasca, Jean-Yves Carlier, *The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?*, 60(2) Common Market Law Review, 2023, pp. 345-390.

<sup>71</sup> According to General Comment No. 14 (note 58 above), the best interests principle applies to public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. In its Paragraph 30, the General Comment specifies that the category 'administrative authorities' include also authorities responsible for immigration, asylum and access to nationality.

<sup>72</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, note 62 above, p. 33.

<sup>73</sup> See Articles 20(5) and Recital 18 of the Qualification Directive, as well as Article 25(6) and Recital 33 of the Asylum Procedures Directive. See also Article 4(3)(c) of the Qualification Directive making specific reference to age as one of the factors to take into account in the assessment of application for international protection, and Article 9(2)(f) of the Qualification Directive concerning acts of persecution of a child-specific nature.

<sup>74</sup> See UN Committee for the Rights of the Child, *General Comment No. 14*, note 58 above, Section B. See also UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, note 62 above, p. 59 and UNHCR, *Technical Guidance: Child Friendly Procedures*, 2021: <https://www.refworld.org/docid/61b7355a4.html>. For a detailed overview of the guarantees and safeguards that apply to children seeking asylum in the European Union, see UNHCR, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014: <https://www.refworld.org/docid/55014f434.html>.

<sup>75</sup> European Court of Human Rights, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, [hudoc.echr.coe.int/eng?i=001-218424](https://hudoc.echr.coe.int/eng?i=001-218424), paras 143-144. See also UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 69.

<sup>76</sup> 'The opinion of the child shall be taken into account in matters concerning him or her in accordance with his or her age and maturity, and the child shall be given the opportunity to be heard in judicial and administrative proceedings concerning him or her. [...] it is important for children who enter the country as refugees to be guaranteed the right to express their views on all aspects of immigration and asylum procedures' (Supreme Administrative Court of Finland, *Case KHO: 2017: 81*, 15 June 2017, [kho.fi/fi/index/maatoksia/vuosikirjapaatokset/maatoksia/1494411512380.html?utm\\_source=ECRE+Newsletters&utm\\_campaign=b97191676-EMAIL\\_CAMPAIGN\\_2017\\_06\\_23&utm\\_medium=email&utm\\_term=0\\_3ec9497afd-b97191676-422311737](https://kho.fi/fi/index/maatoksia/vuosikirjapaatokset/maatoksia/1494411512380.html?utm_source=ECRE+Newsletters&utm_campaign=b97191676-EMAIL_CAMPAIGN_2017_06_23&utm_medium=email&utm_term=0_3ec9497afd-b97191676-422311737)). See also UN Committee on the Rights of the Child, *Z.S. and A.S. v. Switzerland*, Communication No. 74/2019, 16 March 2022, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F89%2FD%2F74%2F2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F89%2FD%2F74%2F2019&Lang=en).

views should be sought and given due weight in order to allow them to participate in the proceedings in a meaningful way.<sup>77</sup>

5.2.3. As far as rules of procedures are concerned, it must be also recalled that asylum interviews are not necessarily in the child's best interests and that their appropriateness needs to be assessed in each individual case.<sup>78</sup> If they are deemed to be opportune, they must be conducted in an adequate environment with age-appropriate interviewing techniques, possibly including non-verbal communication methods (e.g. role-playing, drawing).<sup>79</sup> In this context, children cannot be expected to provide adult-like accounts of their experiences, as they may not have the capacity to be able to process their past experiences and, in the case of younger children, they may be unable to differentiate imagination from reality. For these reasons, caseworkers and decision-makers should receive the necessary training to be able to conduct - where necessary - child-friendly interviews and properly evaluate the reliability and significance of the child's account.<sup>80</sup>

5.2.4. UNHCR underlines that while the burden of proof in asylum procedures is in principle shared, greater lenience should be applied in relation to children's asylum claims, including in relation to the application of the benefit of the doubt.<sup>81</sup> This is because children of different ages and developmental levels will be able to provide different types of information. For instance, children may have only limited knowledge of the existing conditions in the country of origin and country of origin information may not adequately reflect their experiences. In such cases, asylum authorities are required to make additional efforts to gather relevant information.<sup>82</sup>

5.2.5. Second, the best interests of the child apply as a legal principle. Identifying, examining and assessing the best interests of the child feeds into the evaluation of the child's application for international protection. According to General Comment No. 6, such evaluation must be carried out adopting an age- and gender-sensitive interpretation of the refugee definition, including in relation to the concept of well-founded fear, persecution and the various Convention grounds.<sup>83</sup>

5.2.6. In relation to the assessment of the well-founded fear, both objective and subjective factors are relevant. Since a child might be unable to express fear when this would be expected or, conversely, might exaggerate such fear, it is important that decisionmakers conduct an objective assessment of existing persecution risks.<sup>84</sup> In this respect, it would be erroneous to dismiss a child's fear of persecution based on the assumption that perpetrators would not take a child's views seriously or consider them a real threat.<sup>85</sup>

5.2.7. Article 9(2)(f) of the Qualification Directive specifies that acts of persecution can take the form of acts of a child-specific nature.<sup>86</sup> This includes violations of economic, social and cultural rights and of child-specific rights (e.g. the right to an education).<sup>87</sup> The fact that the applicant is a child may be a central factor in the determination of international protection needs, as the alleged persecution may apply only to (or disproportionately affect) children, or because specific child rights may be infringed. In this context, the Spanish

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<sup>77</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 69.

<sup>78</sup> See, for instance, Council of State of France, *Case No. 422017*, 6 November 2019: [www.legifrance.gouv.fr/ceta/id/CETATEXT000039335861/](http://www.legifrance.gouv.fr/ceta/id/CETATEXT000039335861/) and National Court of Asylum, France, Second Section, Second Chamber, *Cases No. 17030975 – 17031078 – 17035295 – 17031240 – 17031077 – 17030908 C*, 22 January 2018: [www.cnda.fr/content/download/127690/1292979/version/1/file/CNDA%2022%20d%C3%88cembre%202018%20Consorts%20X.%20e%20T%20n%E2%88%9E17030975%20-%2017031078%20-%2017035295%20-%2017031240%20-%2017031077%20-%2017030908%20C.pdf](http://www.cnda.fr/content/download/127690/1292979/version/1/file/CNDA%2022%20d%C3%88cembre%202018%20Consorts%20X.%20e%20T%20n%E2%88%9E17030975%20-%2017031078%20-%2017035295%20-%2017031240%20-%2017031077%20-%2017030908%20C.pdf).

<sup>79</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, note 62 above, p. 71. On interviewing asylum-seeking children, see UNHCR, *The Heart of the Matter*, note 74 above, pp. 105-112. See also Court of Cassation, Italy, First Civil Section, *Judgment No. 29943*, 30 December 2020: [www.italgiure.giustizia.it/sncass/](http://www.italgiure.giustizia.it/sncass/), on safeguards applicable to asylum interviews with underage victims of gender-based violence.

<sup>80</sup> It is important to note that the reliability of the child's account will depend very much on the skills of the interviewer to conduct the interview in an age appropriate/child friendly manner. UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 72.

<sup>81</sup> UNHCR, *The Heart of the Matter*, note 74 above, pp. 139 and 142-143.

<sup>82</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, paras 73-74.

<sup>83</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, note 62 above, p. 59.

<sup>84</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, paras 10-11.

<sup>85</sup> On this point, the Austrian Constitutional Court stated that girls adopting a western-oriented way of life do not need to have an intellectually thought-out set of values and it cannot be concluded from the young age of the applicant alone that she lacks a 'western' lifestyle (see Constitutional Court, Austria, *Case No. E3674/2021 Ua*, 29 November 2022: [www.ris.bka.gv.at/VfghEntscheidung.wxe?Abfrage=Vfgh&Dokumentnummer=JFT\\_20221129\\_21E03674\\_00&IncludeSelf=True](http://www.ris.bka.gv.at/VfghEntscheidung.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20221129_21E03674_00&IncludeSelf=True)).

<sup>86</sup> See also Article 4(3)(c) of the Qualification Directive.

<sup>87</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, paras 13-14.

*Audiencia Nacional* has underlined that actions that might not reach the threshold of persecution for adults may amount to persecution in the case of children and that psychological harm may be particularly relevant in children's asylum claims.<sup>88</sup>

5.2.8. The child-sensitive approach in the interpretation of the refugee definition applies also to the assessment of the Convention grounds. In relation to the concept of particular social group, it must be recalled that being a child is an immutable characteristic, as children are clearly unable to disassociate themselves from their age in order to avoid persecution. Given that being a child is directly relevant to one's identity both in the eyes of the individual and of society, children - or a smaller subset of this category such as children who assert their human rights and are thus seen as not adhering to prevailing socio-cultural and/or religious norms - may constitute a particular social group.<sup>89</sup> Age and other characteristics may give rise to particular groups, which do not necessarily cease to exist merely because childhood ends, as the consequences of having belonged to a social group might not end even if the applicant is no longer of a young age.<sup>90</sup>

5.2.9. It is apparent that these legal considerations are also valid in relation to the assessment of asylum applications lodged by children, who have adopted characteristics, values and beliefs that are perceived as non-conforming in their countries of origin.

5.2.10. Lastly, it should be recalled that refugee status is declaratory in nature and that individuals become refugees as soon as they fulfil the criteria enshrined in Article 1A(2) of the 1951 Convention.<sup>91</sup> Therefore, in the assessment of asylum claims based on the adoption of non-conforming behaviours, it would be incorrect to take into account external considerations, such as, for instance, the (un)lawful residence of the applicants on the national territory or their compliance with an expulsion order. In UNHCR's view, regardless of the age of the applicants, the determination of refugee status requires an assessment of whether the criteria of the refugee definition are fulfilled, taking into account all the relevant facts surrounding the claim.<sup>92</sup>

## 6. Conclusion

6.1. UNHCR submits that individuals who assert their human rights and/or have adopted non-conforming behaviours, values and beliefs, and in doing so are thus seen as not adhering to prevailing socio-cultural and/or religious norms (by for example, having adopted a 'western lifestyle') can be considered a particular social group, especially - but not exclusively - if the adoption of these characteristics, values and beliefs occurred in an identity-forming phase of their lives. It follows that national legislation or practice granting refugee status only when these protected characteristics stem from religious or political motives would not be compatible with EU law.

6.2. UNHCR recalls that the general principles on the shared burden of proof in asylum procedures apply and that, when asylum applications are lodged by children, national authorities need to make additional efforts to gather relevant information, including in relation to the identification of a causal link with one or more persecution grounds.

6.3. Lastly, UNHCR restates that, under international refugee and EU law, national authorities are required to apply the best interests of the child in asylum procedures with the aim of adopting the necessary procedural safeguards and of providing a child-sensitive interpretation of the refugee definition.

UNHCR, 21 June 2023

<sup>88</sup> See, for instance, National Court, Spain, *ECLI:ES:AN:2018:60*, 9 February 2018, <https://www.poderjudicial.es/search/indexAN.jsp#>.

<sup>89</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 49. See also, for instance, Administrative Court, Slovenia, *Judgment No. I U 42.2012*, 14 February 2012, English summary: [www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-14-february-2012-i-u-422012#content](http://www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-14-february-2012-i-u-422012#content).

<sup>90</sup> UNHCR, *Guidelines on International Protection No. 8*, note 11 above, para. 50-51. See also the judgment of the Tribunal of Milan, Italy, *Case No. 44416/19*, 20 January 2021, [www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2021/rifugio-11/718-1-trib-milano-20-1-2021/file](http://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2021/rifugio-11/718-1-trib-milano-20-1-2021/file), in which a former child soldier was granted refugee status for membership of a particular social group (or imputed political opinion).

<sup>91</sup> UNHCR, *Handbook*, note 9 above, para. 28. See also Recital 21 of the Qualification Directive, note 6 above, as well as CJEU, *A. and S. v. Staatssecretaris van Veiligheid en Justitie*, note 68 above, paras 53-54, and CJEU, Grand Chamber, *M v. Ministerstvo vnitra and X, X v. Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, 14 May 2019: [curia.europa.eu/juris/liste.jsf?num=C-391/16](http://curia.europa.eu/juris/liste.jsf?num=C-391/16), para. 85.

<sup>92</sup> UNHCR, *Comments on the European Commission proposal for a Qualification Regulation - COM (2016) 466*, February 2018: [www.refworld.org/docid/5a7835f24.html](http://www.refworld.org/docid/5a7835f24.html), p. 12.