



Third party intervention in the case of S.S. v Sweden (ECtHR App. no. 43654/18)

June 2019

The following persons contributed to this expert opinion: Abigail Grace, Jennifer Gryczka, Shota Hitomi, Kyndal Jackson, Misha Jans (students), prof. Hemme Battjes and prof. Pieter Boeles (supervisors), dr. Marcelle Reneman (coordinator).

The Migration Law Clinic of the VU University Amsterdam provides legal advice to lawyers, Non-Governmental Organisations, and other organisations on complex legal questions of European migration law. Top students in the last years of their study at the Law Faculty of the VU University Amsterdam carry out research and write legal advice at the Clinic. The Migration Law Clinic is the responsibility of the Foundation (Stichting) Migration Law Expertise Centre (No. 59,652,969 Chamber of Commerce).

Introduction

1. This amicus curiae letter is submitted by the Migration Law Clinic of the Vrije Universiteit Amsterdam in the case of *S.S. v. Sweden* (43654/18). The submission will first address the cumulative risk-factor test as an approach to understanding the real risk of a violation of Article 3 of the European Convention on Human Rights ("the Convention") where there are multiple and possibly co-dependent risk factors at stake. Next, the submission will explore under what circumstances Contracting States may incur indirect responsibility of a flagrant violation of Article 9 of the Convention upon expulsion of an applicant.

The complaint regarding a violation of Article 3 of the Convention

1. **Combining Risk Factors**
2. In *NA v the United Kingdom (NA v UK)*, the European Court of Human Rights (the Court) emphasised: 'the assessment of whether there is a real risk [of ill-treatment] must be made on the basis of all relevant factors which may increase the risk of ill-treatment. [...] Due regard should be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively [...] may give rise to a real risk.'¹
3. Given that *NA v UK* used as its starting point the question of whether the individual belongs to a vulnerable group, the first step must be to consider whether that group is 'at risk' and whether the applicant is a member of such a group. If no group risk can be identified, other risk factors must subsequently be considered. The need to consider all risk factors cumulatively follows from the obligation to have due regard to all the relevant circumstances when assessing the deportation of an applicant to his country of origin and whether this entails a real risk of a violation of Article 3 of the Convention.² The rigorous scrutiny due to the absolute nature of the right in cases involving a complaint of a violation of Article 3 requires the real risk assessment to consider the totality of the circumstances of the applicant and all the factors adding to the risk of a violation of that right.
4. In the case of *NA v UK*, the Court drew on the UK Asylum and Immigration Tribunal's (the Immigration Tribunal) approach to risk assessment in expulsion cases, as established in the case of *LP*. Instead of identifying one or more 'risk categories' (possible only when there is sufficient evidence to justify a finding that a particular category of persons are at risk), the Immigration Tribunal delineated various 'risk factors', which may not alone form a sufficient ground for finding a violation but may nonetheless increase the risk to the applicant when considered alongside other factors in their totality.³ In doing this, the Immigration Tribunal considered that it was essential to correctly weigh the different sources according to their objective merits, and to consider the criteria as flexible, whereby the risk factors (as listed as examples in the present case) are 'non-exhaustive and non-conclusive'.⁴
5. The use of such an exercise is imperative when assessing the multiple and possibly co-dependent risk factors at stake. It is the Intervener's submission that the risk-factor test is a mechanism, which provides greater clarity in understanding the interplay of the factors involved. Further, it better reflects the reality of how a risk under Article 3 is manifested. The occurrence of one heightened element of risk may be conditional on the instance of another factor: for example, having one's scars (which confirm suspicions regarding membership of a persecuted group) discovered upon a search by the authorities, triggered by a registration of a past detention or (alleged) membership of the group.⁵ While having scars or being registered may in itself not be sufficient for a real risk of ill-treatment, taken together they present a very real risk of ill-treatment.⁶

¹ *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 130.

² *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 130; *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) paras 128-129.

³ *TK (Tamil - LP updated) Sri Lanka CG v Secretary of State for the Home Department* [2009] UKAIT 00049 [4]

⁴ *LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka CG v Secretary of State for the Home Department* [2007] UKAIT 00076 [227].

⁵ See eg *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 147; *I v Sweden* App no 61204/09 (ECHR, 20 January 2014) paras 67-69.

⁶ As decided by the Court in the cases of *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 147; and *I v Sweden* App no 61204/09 (ECHR, 20 January 2014) paras 67-69.

6. The risk-factors approach allows for each element to be evaluated in a way which is proportionate to its severity and likelihood, but then also reappraised within the context of other factors to see if a cumulative risk is present.⁷

1.1 Establishing Risk Factors

7. The Court has established different elements of an applicant's situation that can comprise a risk factor. As emphasised by the UNHCR, the elements that can cumulatively give rise to a well-founded fear of persecution, will depend on the circumstances of an applicant.⁸ The risk factors mentioned in the case-law of the Court should therefore be interpreted flexibly and as a non-exhaustive list.⁹ The Court has found various elements, which may constitute possible risk factors, such as experiences of past ill-treatment, the fact that someone has claimed asylum abroad,¹⁰ the origin of the applicant, or the likelihood of attracting the attention of the persecutor.¹¹ The Court's case law has given substance to a number of these risk factors. For instance, the gender and origin of an applicant, as a risk factor, includes the perception of society on gender roles, limitations on conducting social life, and non-conforming behaviour as contributing to a real risk of a violation of Article 3 of the Convention.¹²
8. The Court has also identified factors which may mitigate risks of ill-treatment. These should be weighed against risk factors to give an accurate picture of the risk one faces. Blöndal and Arnardóttir identify elements from the case-law of the Court, such as the presence of a supportive NGO, the existence of a male protection network and an applicant's connections with powerful individuals.¹³

1.2 Balance and Interaction of Risk Factors

9. With regards to establishing the cumulative and interactive nature of the factors involved, the Immigration Tribunal judgement in *TK* describes the process aptly; 'The wisdom we derive from the ECtHR's analysis of the LP approach is that it treats each factor as furnishing a point of focus for considering related indicators and also allows for adjustment in respect of each in the light of new evidence'.¹⁴
10. As outlined, the risk factors should first be considered individually, then cumulatively, allowing for some factors, which may not be of great significance in their own right, to be considered as contributory. Instead of assessing factors in isolation, and dismissing those which do not amount to a real risk of ill-treatment, the objective of the exercise is to build a 'risk profile'¹⁵, which encompasses those factors which 'would be a contributing factor that would need other, perhaps more compelling factors, before a real risk could be established'.¹⁶
11. Appropriate weight should be attributed to the risk factors, whilst considering how mitigating factors may reduce the severity of the individual risks or the overall risk of ill-treatment. An example may be that whilst age can be a strong risk factor (a young woman or teenager may be more vulnerable than an older woman), the applicant's skills

⁷ LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG v Secretary of State for the Home Department [2007] UKAIT 00076 [238].

⁸ UNHCR, *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011) para 53.

⁹ Cf *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 44.

¹⁰ *J.K. v Sweden* App no 59166/12 (4 June 2015) para 95; LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG v Secretary of State for the Home Department [2007] UKAIT 00076, [238].

¹¹ See eg *T.N. and S.N. v Denmark* App no 36517/08 (ECHR, 20 January 2011) paras 116-17; *P.K. v Denmark* App no 54705/08 (ECHR, 20 January 2011) para 98; *N.S. v Denmark* App no. 58359/08 (ECHR, 20 January 2011) para 79; *J.H. v UK* App no 48839/09 (ECHR, 20 December 2011); *I v Sweden* App no 61204/09 (ECHR, 20 January 2014) paras 67-69.

¹² *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008), (i.a.) paras 55-65.

¹³ Erna Kristín Blöndal and Oddný Mjöll Arnardóttir, 'Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances' (2018) Vol 5, Oslo Law Review, 147. Available at <www.idunn.no/oslo_law_review/2018/03/non-refoulement_in_stasbourg_making_sense_of_the_assessme> accessed 04 May 2019; eg from *Sufi and Elmi v UK*, App nos 8319/07 and 11449/07 (ECHR, 28 June 2011) para 249-50.

¹⁴ *TK (Tamils – LP updated) Sri Lanka CG v Secretary of State for the Home Department* [2009] UKAIT 00049 [125].

¹⁵ *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 39.

¹⁶ *N.A. v UK* App no 25904/07 (ECtHR, 17 July 2008) para 40.

or educational level may mitigate this risk (a young educated woman who has qualifications, can gain employment and can provide for herself and so may fare better than a older, illiterate woman).

2. Risk factors in this case

12. The interveners submit three prominent and relevant risk factors based upon an examination of Afghanistan's country of origin information and the Court's case law: forced marriage, westernisation, and apostasy.¹⁷
13. As asserted by the Court in *Sufi and Elmi*,¹⁸ when gauging the weight to be attributed to country of origin information, particular consideration must be given to its independence, reliability and objectivity. In turn, the country of origin information addressed in this opinion will include the following sources: EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan'¹⁹; EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms'²⁰; UNHCR 'Eligibility Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan'²¹; the UK Home Office Country Policy and Information Note, 'Afghanistan: Women Fearing Gender Based Violence'²²; and finally the Dutch 'Country of Origin Report on Afghanistan'²³.

2.1 Forced Marriage

14. While not being able to choose one's own marriage partner is a reality for many men and women in Afghanistan, forced marriage has been identified both as prevalent²⁴ and as a harmful element of traditional marriage practices, specifically when it leads to gender-based or honour-based violence.²⁵
15. More widely, it has been suggested that forced marriage constitutes a violation of human rights in many aspects; it breaches the right to bodily integrity, it can infringe Article 8 of the Convention (by limiting the ability to develop one's own personality and form relationships²⁶), it can be seen as akin to slavery, by increasing the risk of violations of Article 2 of the Convention through honour-killings and it can, in some cases, amount to a violation of Article 3 of the Convention in and of itself.²⁷
16. Further, the Committee on the Elimination of Discrimination against Women stated in their General Recommendation No. 21 that 'a woman's right to choose a spouse and enter freely into marriage is central to her life and her dignity and equality as a human being'.²⁸ Moreover, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, states in Article 1(1) that '[n]o marriage shall be legally entered into

¹⁷ These three prominent risk factors were identified using the first question posed by the Court to the parties to the case (emphasising the circumstances regarding the applicants' marriage and the period of time spent in Sweden) in combination with the Country of Origin Information on Afghanistan (identifying apostates, women and westernised individuals as groups specifically at risk of harm in Afghanistan); See i.a. EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office (June 2018), p 14-19.

¹⁸ *Sufi and Elmi v UK* Application nos 8319/07 and 11449/07 (ECHR, 28 June 2011) para 230.

¹⁹ EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office (June 2018).

²⁰ EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office (December, 2017).

²¹ UNHCR, 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02 (30 August 2018).

²² UK Home Office, Country policy and information note, 'Afghanistan: Women fearing gender- based violence' (December 2016).

²³ Dutch Ministry of Foreign Affairs, 'NL Country of Origin report on Afghanistan' (November 2016).

²⁴ According to the Afghan Independent Human Rights Commission, 60-80% of the marriages in Afghanistan are concluded without the consent, or against the will of one of the spouses. See Kabebeh Rastin-Tehrani and Nadjma Yassari, 'Max Planck Manual on Family Law in Afghanistan', (amended 2nd Edition, July 2012). Available at www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf accessed 25 April 2019, p 32.

²⁵ EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office (June 2018), p 54.

²⁶ See *Niemietz v Germany* App no 72/1991/324/396 (ECHR, 16 December 1992).

²⁷ Liberty, 'Briefing: Forced Marriage (Civil Protection) Bill' (2007). Available at www.libertyhumanrights.org.uk/sites/default/files/liberty-briefing-forced-marriage-bill.pdf accessed 25 April 2019, p 5.

²⁸ Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No. 21: Equality in Marriage and Family Relations', (1994). Available at www.refworld.org/docid/48abd52c0.html accessed 1 May 2019, para 16.

without the full and free consent of both parties' [emphasis added] and so it may be asserted that forcing someone to remain in a marriage they did not 'fully' and 'freely' consent to, is tantamount to a violation of that Convention.²⁹

17. The situation in the country of origin holds particular weight. The Court has found that a woman, who has fled a forced marriage would be in considerable danger in countries where she will not be protected from reprisals.³⁰ The actors who pose such risks are likely to be the spouse or other close family members, who are familiar with the applicant.³¹ Consequently, an applicant is at a high risk of being discovered following any resistance to the marriage or a past or future attempt to flee the marriage.
18. Forced marriage in Afghanistan is illegal (under both the Afghan Penal Code and Sharia law), but these laws are not reliably enforced and victims are not adequately protected.³² Conflictingly, cultural marriage traditions *are* enforced by communities³³, as are punishments for breaches of Sharia law against women on the basis of 'moral crimes'³⁴, which includes refusing marriage or running away from home.³⁵ Thus, violations stemming from forced marriage are not solely domestic in nature; perpetrators often act with support from wider society and with impunity from criminal punishment.³⁶
19. The personal circumstances of a woman who has fled a forced marriage will be relevant to determine whether it is a risk factor³⁷ and subsequently its weight in the risk-factor test. Some factors of relevance include; the age, sex and vulnerability of the victim³⁸, the area of Afghanistan from which she originates, her ethnicity, the religious conservatism of her family, the power or influence of the individual she is forced to marry or his family, any previous attempts to refuse or leave the marriage and so on.³⁹
20. As mentioned, returning someone to a forced marriage can result in several foreseeable consequences. In its most severe form the husband or family can respond by carrying out so-called 'honour killings'.⁴⁰ Otherwise, the woman faces one of two bleak choices. The first is to remain in a forced relationship with likely consequences of restrictions to her movement (in light of her attempted 'escape'), limitations on her rights to social interactions and her ability to form other relationships,⁴¹ non-consensual sex (spousal rape is not criminalised⁴²), possible violence and other degrading treatment. It is notable that in Afghanistan female rates of depression due to domestic violence and

²⁹ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) UNTS 7525 Article 1.

³⁰ *RH v Sweden* App no 4601/14 (ECHR, 10 September 2015) para 38.

³¹ United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018) p 72.

³² 'Victims of crimes such as forced marriage or rape may also risk being considered to be an offender in the eyes of the law when seeking help, despite it being legal to leave a situation of abuse'. See Migrationsverket (Swedish Migration Agency), 'Temarapport Afghanistan: Hedersproblematik och moralbrott', (19 January 2018), <https://lifos.migrationsverket.se/dokument?documentAttachmentId=45400> accessed 04 May 2019, p.5 cited in United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018) p 78 at footnote 497.

³³ UK Home Office, Country policy and information note Afghanistan: Women fearing gender-based violence, p 21 at para 7.1.2.

³⁴ 'The Afghan state is frequently arresting and prosecuting women and girls for so called "moral crimes" such as zina and attempted zina [meaning illicit sexual relations]. The judicial process is characterized by a lack of rule of law and it happens that persons are charged with moral crimes not codified by law'. See Migrationsverket (Swedish Migration Agency), 'Temarapport Afghanistan: Hedersproblematik och moralbrott', (19 January 2018), <https://lifos.migrationsverket.se/dokument?documentAttachmentId=45400> accessed 04 May 2019 pp 4-5. cited in United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018) p 78 at footnote 495.

³⁵ United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018). p.77.

³⁶ *Ibid*, p 69.

³⁷ EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office (June 2018) p 54.

³⁸ *Ireland v United Kingdom* App no 5310/71 (ECHR, 18 January 1978) para 162.

³⁹ EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office (June 2018) p 56.

⁴⁰ UNHCR, 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018) p 72.

⁴¹ *RH v Sweden* App no 4601/14 (ECHR, 10 September 2015) para 10.

⁴² US Department of State, 'Country Report on Human Rights Practices for 2014 Afghanistan', Section 6 (26 June 2015), www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236632 accessed 17 November 2015, p 37.

related human rights abuses are high with many women committing suicide or self-immolating⁴³. In the north of the country this is often as a result of marriage and having to fit 'into traditional structures [...] after [the relative freedom] of their adolescence'.⁴⁴ Thus, domestic violence is prevalent and where reported, a 'factor often taken into account is whether the violence was a response to a woman's disobedience'.⁴⁵ Despite this, it is not explicitly classified as a crime in the Penal Code.⁴⁶

21. The second choice is to attempt to live as a divorced or estranged woman, who lacks a male-protection network in a patriarchal society rife with stigma; the Country of Origin guidance issued by the UK Home Office acknowledges that living alone, particularly without a male protection network, is 'socially and culturally impossible for all but a handful of elite Afghan women'.⁴⁷
22. Regardless of whether the particulars of any given situation mean that the forced marriage amounts to a violation of Article 3 ECHR itself, it is highly possible that it constitutes a contributory risk factor of such violation.

2.2 Westernisation

23. Afghan deportees and returnees may be viewed by their family and community as 'contaminated' by the West, having become 'Westernised' or 'un-Islamic' during their time spent in Europe.⁴⁸ Accordingly, persons can be perceived as 'Westernised' due to their behaviour, appearance and expressed opinions, which contravene the norms of Afghan society.⁴⁹ A prolonged stay in Western countries can also constitute Westernisation⁵⁰, due to the difficulties individuals experience when reintegrating back into the family and society.⁵¹ In other words, the length of time a person spends in Europe can strongly affect the likelihood of experiencing particular difficulties with reintegration.⁵² Particularly where women have worked outside the home or have pursued higher education, they will be considered 'Westernised'⁵³, as such roles defy societal norms regarding the role of women in Afghan society.⁵⁴
24. Afghans who identify with Western values may be subjected to a real risk of ill-treatment from their family, society and insurgents.⁵⁵ In particular, as far as Afghan society is concerned, a distinction must be made in relation to the perception of men on the one hand, and women on the other. The societal position of women is entrenched across a collection of mores, norms and values which are fixed in family, religious, tribal and customary traditions.⁵⁶ In turn, Afghan society comprises of deeply embedded attitudes and structures which reinforce gender discrimination⁵⁷ and male preference⁵⁸. Accordingly, where women have become accustomed to the freedoms and

⁴³ UNHCR, 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02 (30 August 2018) p 68.

⁴⁴ Dina Latek, 'Afghanistan: 2014 and beyond', *Austria: Federal Ministry of the Interior*, (March 2014), www.refworld.org/docid/53564a484.html, accessed 27 November 2015. p.50. Cited UK Home Office, 'Country policy and information note Afghanistan: Women fearing gender- based violence', (Version 2.0, December 2016) p 20, para 6.3.5.

⁴⁵ UK Home Office, 'Country policy and information note Afghanistan: Women fearing gender- based violence', (Version 2.0, December 2016). p. 27 at para 8.4.2.

⁴⁶ Ibid.

⁴⁷ Ibid, p 19, para 6.3.3.

⁴⁸ EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office, (December 2017), p.101, at para 8.7.

⁴⁹ EASO, 'Guidance Note and Common Analysis - Country Guidance: Afghanistan' (European Asylum Support Office, June 2018) p.57.

⁵⁰ Ibid.

⁵¹ N. v Sweden, App no 23505/09 (ECtHR, 20 July 2010).

⁵² EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office, (December 2017), p.103, at para 8.8.

⁵³ EASO, 'Guidance Note and Common Analysis - Country Guidance: Afghanistan' (European Asylum Support Office, June 2018) p.57.

⁵⁴ UK Home Office, Country policy and information note, 'Afghanistan: Women fearing gender- based violence', (December 2016), pp.24-25.

⁵⁵ EASO, 'Guidance Note and Common Analysis - Country Guidance: Afghanistan' (European Asylum Support Office, June 2018) p.57.

⁵⁶ EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office, (December 2017), p.33.

⁵⁷ EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office, (December 2017), p.33.

⁵⁸ UK Home Office, Country policy and information note, 'Afghanistan: Women fearing gender- based violence', (December 2016), p.10.

independence of Western societies, they experience great difficulties adjusting to Afghanistan's societal restrictions.

25. The individual assessment relating to the level of risk required to establish a real risk of ill-treatment must take into account risk-impacting circumstances such as: gender (higher risk for women), adopted behaviour (including differences in clothing), area of origin (higher risk in rural areas), conservative environment, family perception of traditional gender roles, age (difficult for children to re-adjust to Afghanistan's societal restrictions) and visibility of the applicant.⁵⁹
26. Women are exposed to a particular risk of ill-treatment prohibited by Article 3 of the Convention, if they are perceived as not 'conforming to the gender roles ascribed to them by society, tradition and even the legal system'.⁶⁰ In turn, such individuals may be subjected to domestic violence and other punishments,⁶¹ including public lashings or even death.⁶² Often, women returning from the West have to navigate between two parallel worlds: 'the outside appearance, where one must conform to all the traditional social and gender norms, and the inside world; care must be taken not to say certain things that could be seen as un-islamic'.⁶³ As asserted by the Court in *Sufi and Elmi*⁶⁴, exercising restraint may become impossible where an individual has become 'Westernised'. In turn, 'Westernised' women with no recent experience of living in Afghanistan are simply inadequately equipped to 'play the game'.⁶⁵

2.3 Apostasy

27. The Court has ruled that apostasy can result in a risk of ill-treatment and ultimately a violation of Article 3 of the Convention, dependent upon country of origin information, the individual's circumstances, and the foreseeable consequences of expulsion.⁶⁶ As with all Article 3 violations, the risk of harm (as a result of the apostasy) must reach a minimal level of severity. Apostasy has been considered as an individual risk factor and therefore should also be given adequate weight when considered alongside other risk factors.
28. When considering apostasy in Article 3 cases, the Court first considers the situation in the country of expulsion, exemplified in *F.G. v Sweden*.⁶⁷ The Court investigates the criminalization and the country's history of punishing apostasy or perceived apostasy. In Afghanistan, it is estimated that 99% of the population is Muslim.⁶⁸ There is no specific law protecting an individual's right to freedom of religion, or non-religion.⁶⁹ While Afghanistan's Criminal Code does not refer to religious conversion, 'flagrant crimes' such as conversion can be punishable by death under law.⁷⁰ As conversion is considered a form of apostasy, it is logical to conclude that apostasy too would constitute a 'flagrant crime', thus invoking similar consequences.⁷¹ Under both the Constitution and Islamic law, apostasy can result in the imposition of the death penalty.⁷² The UNHCR guidelines on Afghanistan discuss how any conversion from Islam is considered apostasy and how there are no legal safeguards or guarantees for those accused of

⁵⁹EASO, 'Guidance Note and Common Analysis - Country Guidance: Afghanistan' (European Asylum Support Office, June 2018) p.57.

⁶⁰ *N. v Sweden*, App no 23505/09 (ECtHR, 20 July 2010), para 55; EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office, (June 2018), p.57.

⁶¹ *N. v Sweden*, App no 23505/09 (ECtHR, 20 July 2010), para 55.

⁶² See e.g. the incidents cited in United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Afghanistan', HCR/EG/AFG/18/02, (30 August 2018) p.66.

⁶³ EASO Country of Origin Information Report, 'Afghanistan Individuals targeted under societal and legal norms', European Asylum Support Office, (December 2017), p.106.

⁶⁴ *Sufi and Elmi v The United Kingdom*, App no 8319/07 and 11449/07 (ECHR, 28 June 2011), para 275.

⁶⁵ *Sufi and Elmi v The United Kingdom*, App no 8319/07 and 11449/07 (ECHR, 28 June 2011), para 275.

⁶⁶ *FG v Sweden* App no 43611/11 (ECHR, 23 March 2016) para 120.

⁶⁷ *FG v Sweden* App no 43611/11 (ECHR, 23 March 2016) para 112.

⁶⁸ Ministry of Foreign Affairs, 'Country of Origin Report on Afghanistan' (Government of the Netherlands 2016), p 61.

⁶⁹ *Ibid*, p.61.

⁷⁰ *Ibid*. This is considered permissible as the criminal code should align with Hanafi jurisprudence.

⁷¹ *Ibid*, pp 61, 63.

⁷² *Ibid*, p 75.

apostasy.⁷³ Additionally, in cases involving apostasy, applicants can face a risk of ill-treatment based on ‘prevalent moral codes’ beyond laws, where the threat of serious harm would stem from Afghan society and include informal enforcement of accepted social norms.⁷⁴

29. In addition to the country’s general situation (including the legal stance on apostasy), the Court investigates the individual’s personal circumstances.⁷⁵ Serious harm stemming from Afghan society and other forces such as the Taliban, depend on the individual’s case and circumstances. Behavior that can be perceived as linked to apostasy, results in a risk to the applicant.⁷⁶ However, the EASO guidelines assert that such behaviours should not be subject to restraint (i.e. applicants ‘cannot be expected to appear Muslim when they have non-theistic or atheist views’).⁷⁷
30. The Court also discusses the foreseeable consequences and risks of harm that could follow from expulsion when investigating apostasy and religious conversion. These foreseeable consequences are largely dependent on the previous factors of the country’s circumstances, the individual’s personal case, and the Court’s assessment of the two. In the case of Afghanistan, because there is no legal recourse if one has committed apostasy or is perceived as such, the foreseeable consequences include prison sentences and possible implementations of the death penalty.

3. Cumulative Assessment of Risk Factors

31. It is the interveners submission that the cumulative assessment of the above mentioned risk factors is crucial in ascertaining the true nature of the risk an applicant may face if returned to Afghanistan. A separate assessment of each risk factor fails to consider the nuanced consequence of being exposed to multiple risk factors. As an illustration of the method proposed, it may be useful to consider the possible interaction of the three risk factors outlined.
32. As detailed above, it is clear that an applicant who has been forcibly married has two choices: to remain married to their spouse or to flee. In the first instance, the presumption is that she must remain living under the same roof as her husband. This in itself may make the concealment of any ‘Westernised’ traits more difficult. Similarly, it would be impossible to hide the applicant’s apostasy, as doing so would mean total concealment of her atheism and ‘play acting’ as a Muslim in both public and private spheres for the rest of her life. Unlike in the case of *ME v Sweden*⁷⁸ in this situation restraint cannot be accepted because of the longevity of the restraint and the serious nature of the risk factors necessitating restraint. The forced-marriage can be seen as an ‘amplifier’ of the risks associated with Westernisation and apostasy; forcing such behaviours to be noticed by the actors of harm.
33. Secondly, if the applicant chooses to flee the forced marriage, besides the danger this act attracts in and of itself, she is placing herself outside of the ‘acceptable’ social structures and thus draws attention from wider-society. Especially when one considers the societal position of women in particular. Any Western traits or further refusal to conform to society (by not adhering to Islamic practices or societal norms) would more readily be observed and so more weight should be given to the associated risks as a result. Factors, such as male protective networks can mitigate some of the risks posed by larger society. However, these are contextual and the effectiveness depends on both the risk factor and the actor of harm. Finally, the interplay of Westernisation and apostasy is also significant in that the presence of one can draw attention from society, and as a result, masking the other becomes more difficult.
34. Although the risk factors taken independently may not alone be sufficient to constitute a general risk, the likelihood of being discovered is increased by the specific interaction of the factors undoubtedly present in the case.

⁷³ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers From Afghanistan, HCR/EG/AFG/18/02, (30 August 2018) p 64.

⁷⁴ EASO, ‘Guidance Note and Common Analysis - Country Guidance: Afghanistan’ (European Asylum Support Office, June 2018) p 28.

⁷⁵ *FG v Sweden* App no 43611/11 (ECHR, 23 March 2016) para 120.

⁷⁶ EASO, ‘Guidance Note and Common Analysis - Country Guidance: Afghanistan’ (European Asylum Support Office, June 2018) p 28.

⁷⁷ *Ibid*, p 60.

⁷⁸ *ME v Sweden*, para 88.

4. Conclusions

35. Our recommendation that a risk-factor test be applied as a mechanism for countenancing multiple risks of a violation of Article 3 of the Convention, is both grounded in, and dependent on the thorough examination of such risks heretofore in the Court's case law. As such, the Court will be best placed to conduct the final assessment. However, the above discussion evidences the value of the risk-factor test in Article 3 cases when multiple, interrelated factors are at play.

The complaint regarding a violation of Article 9 of the Convention

1. Indirect responsibility for a flagrant violation of Article 9 of the Convention

36. In certain circumstances, Contracting States are prohibited from expelling individuals, where there is a real risk of violation of a substantive Convention right upon expulsion. In such cases, the Contracting States will be indirectly responsible for these violations outside of their jurisdiction. This prohibition has been enforced in the Court's jurisprudence where Articles 2, 3, 5 and 6 of the Convention are at risk of being violated.⁷⁹

37. In *Z. and T. v UK*, the Court stated that it 'would not rule out the possibility that the responsibility of the returning State might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of a flagrant violation of that Article in the receiving State'.⁸⁰ The Intervener agrees with the Court that protecting the fundamental right embodied in Article 9 of the Convention, in exceptional expulsion cases, ensures consistency in the protection of the rights guaranteed by the Convention. The Court has emphasised the fundamental nature of the right embodied in Article 9 on multiple occasions,⁸¹ stating '[f]reedom of thought, conscience and religion is one of the foundations of democratic society [...]. It is [...] one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society [...] depends on it'.⁸²

38. The Court, within its own judgement, explicitly leaves open the possibility that the Contracting States can incur indirect responsibility for a violation of Article 9 in 'exceptional circumstances' where a 'real risk of a flagrant violation' is shown to exist. By requiring 'exceptional circumstances' and a real risk of a *flagrant* violation, the Court sets a higher threshold compared to violations of Articles 2 and 3 of the Convention. Below, we explore what the Court may consider to be a 'flagrant violation' of Article 9, considering the specific elements of the Article within the context of the case at hand.

2. A flagrant breach of Article 9 of the Convention

39. In following the Court's case law a 'flagrant violation' of a Convention right entails a violation of an Article of the Convention "which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article".⁸³ The interveners would like to emphasize that in following this jurisprudence, what marks a violation of Article 9 as flagrant is the nullification of the essence of the right protected under that article, independent from whether or not the violation (also) reaches the threshold of a violation of Article 3. The interveners acknowledge that in *Z. and T.* the Court provided that 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention'. However, it is important to clarify that this is not a declaration by the Court that an Article 9 violation *must* also violate Article 3. Moreover, this statement must be understood within its context. While the above

⁷⁹ See i.a. *Soering v. UK* App no 14038/88 (ECtHR, 7 July 1989); *Othman (Abu Qatada) v UK*, App no 8139/09 (ECtHR, 17 January 2012); *F.G. v. Sweden* App no 43611/11 (ECtHR, 23 March 2016); *El-Masri v Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012).

⁸⁰ *Z and T v UK* App no 27034/05 (ECtHR admissibility decision, 28 February 2006).

⁸¹ See eg *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) para 33, where the Court speaks of the 'fundamental nature of the rights guaranteed in Article 9'.

⁸² *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) para. 31.

⁸³ *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012) para 260.

situation may have been difficult to visualise at the time of this decision, the Court has since considered ‘flagrant violations’ and ‘flagrant breaches’ of Articles 5 and 6 of the Convention, barring expulsion independently of any Article 3 considerations. A flagrant violation of Article 9 should therefore not be understood through the lens of Article 3 but rather through the fundamental nature of the article being violated. Considering the presence of a flagrant violation therefore requires establishing the essence, or the core of Article 9.

40. The primary element that constitutes the core and essence of Article 9 is an individual’s freedom to hold a certain thought, conscience and religion and to change one’s religion or belief.⁸⁴ The Court has found this *forum internum* aspect of Article 9 to be ‘absolute and unqualified’.⁸⁵ This in turn generates a number of ancillary rights⁸⁶, which can be considered part of the *forum internum* aspect of Article 9. The first is an individual’s right not to disclose one’s religion or belief.⁸⁷ This is important as there are situations conceivable where an individual will feel a (pressing) need to not disclose their religion, belief or thought. The absolute protection of the *forum internum* involves an obligation on the State to not intervene in the *forum internum* by investigating an individual’s belief or religion, or by forcing the individual to (directly or indirectly) disclose one’s beliefs.⁸⁸ However, it must be noted that there are situations whereby concealment may not be possible, especially where conversion is connected with behavioural or cultural changes (i.e. Westernisation) which would not go undetected. A further ancillary obligation following from the absolute protection of the *forum internum* is the obligation on the State not to coerce an individual to hold a belief or religion, or to change his belief or religion.⁸⁹ It seems clear from the absolute and unconditional protection of the *forum internum* aspect of Article 9 of the Convention that, if there is a real risk that the individual’s freedom to hold a certain thought, conscience or religion and to change one’s religion or belief is violated in the receiving State, the Member State expelling the individual incurs indirect responsibility for that flagrant violation.
41. The Court has expressed some concerns regarding practicability if the Contracting States were to incur responsibility in case of a real risk of a flagrant violation of Article 9 of the Convention in the receiving state, mainly because ‘it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world’.⁹⁰ However, limiting the indirect responsibility of the Contracting States’ to cases which meet the high threshold of a flagrant violation restricts the obligation to the very limited number of cases involving the risk of a nullification of the core of Article 9. In turn, adhering to a high but justified threshold evades the practical concern anticipated by the Court, while guaranteeing the appropriate protection of the right enshrined in Article 9 of the Convention.

3. A flagrant breach of Article 9 of the Convention in the current case

42. Following the country of origin information examined in this opinion it is likely that upon removal to Afghanistan the applicant would incur a real risk of a flagrant violation of Article 9. The Afghan laws severely punishing apostasy, constitute a clear interference with the applicant’s *forum internum*,⁹¹ forcing a certain belief upon the applicant. As follows from information of the UNHCR and EASO, due to the important role of religion in Afghanistan, apostasy carries severe risks of harm from Afghan society.⁹² Unlike living in secular countries, where not adhering to a faith or ‘converting’ to atheism is not noticeable nor easily perceived by society, in Afghanistan apostasy can be

⁸⁴ Art 9(1) ECHR.

⁸⁵ Note that the limitation clause in the second limb of Art 9 only refers to the freedom to manifest a religion, not to the *forum internum* freedom to hold a religion, belief or thought; *Eweida and others v UK* App nos 48420/10 and further (ECtHR, 15 January 2013) para 80.

⁸⁶ See Evans, M., “The Freedom of Religion or Belief in the ECHR since Kokkinakis: Or “Quoting Kokkinakis”, 12 *Religion and Human Rights* (2017).

⁸⁷ ‘[T]he right not to disclose one’s religion or beliefs [...] falls within the *forum internum* of each individual’, *Sinan Isik v Turkey* App no 21924/05 (ECtHR, 2 February 2010) para 42.

⁸⁸ *Dimitras v Greece* App nos 42837/06 and further (ECtHR, 3 June 2010) para. 78; *Alexandridis v. Greece*, App no 19516/06 (ECtHR 21 February 2008) para. 38; *Sinan Isik v. Turkey* App no 21924/05 (ECtHR, 2 February 2010).

⁸⁹ See eg *Ivanova v Bulgaria* App no 52435/99 (ECtHR, 12 April 2007) para 79.

⁹⁰ *Z and T v UK* App no 27034/05 (ECtHR admissibility decision, 28 February 2006).

⁹¹ EASO Guidance Note and Common Analysis, ‘Country Guidance: Afghanistan’, European Asylum Support Office, (June 2018) p.60; See further above section 2.3.

⁹² UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan (p.63); EASO Guidance Note and Common Analysis, ‘Country Guidance: Afghanistan’, European Asylum Support Office, (June 2018) p.28.

punishable by death or imprisonment.⁹³ In order to avoid risks of such treatment, the applicant must fake being part of the larger religious community. In doing so, her performance must be convincing, particularly with regards to the people closest to her, as they may subsequently become actors of harm upon the discovery of her true conscience.⁹⁴ Although this might not by definition touch upon the applicant's *forum internum*, it will influence each and every form of manifestation of her (true) conscience.

43. Pretending to be part of the Islamic community will limit manifestations of the applicant's (atheist) conscience when pretending to believe in the Islamic religion, for example, being forced to attend prayer and wear a hijab. Conforming to Islamic customs and norms will further limit manifestations of her true conscience. It could impede upon her abilities to pursue an education or profession outside of the family home and force her to raise children with norms and values in which she does not believe, whilst being unable to protect them from practices she may deem harmful (such as, child or forced marriage or circumcision). Acting upon a belief that the applicant does not hold (which may at times be in direct conflict with a belief she *does* hold) and not being able to act upon her own beliefs in the most essential aspects of her life, for the rest of her life, is not compatible with the absolute and unqualified protection of the *forum internum*.
44. The applicant will also be required to conceal her true conscience in both her public and private life as a consequence of her forced marriage and family circumstances. There is no forum whereby the applicant may freely express herself. Therefore, once again the interveners must emphasize that an expulsion will require the applicant to conceal the true nature of her *forum internum* during every moment of her daily life, for the rest of her life. Forcing the applicant to give up her conscience in this manner seems to constitute a clear violation of the *forum internum* aspect of the freedom protected by Article 9 of the Convention, violating the core of the freedom it protects. As such, the expulsion of the applicant in the current case could involve a flagrant violation of Article 9. If so, the Contracting State will be indirectly responsible for the violation, and will thus be obliged not to expel the applicant.

⁹³ EASO Guidance Note and Common Analysis, 'Country Guidance: Afghanistan', European Asylum Support Office, (June 2018) p 60.

⁹⁴ See further above section 2.3.