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1. Introduction

This article presents the findings from a review of approximately 70 appellate court cases from 2010 to 2015 trying religion-based claims for international protection in Norway and Canada under the 1951 Refugee Convention. The article has three parts. The first part presents the main features of the refugee status determination procedure in Norway and Canada and introduces the purpose and methodology of the examination. The second part presents the specific challenges generated by religion-based claims and introduces the standard of review and the dominant legal precedent relied upon and discussed by the appellate courts, before going in-depth on the ways in which the courts have approached the subject of religion more specifically. This assessment explores the significance of the timeline of events in the stories presented by claimants, the role of testimonies and affidavits from pastors, co-congregants and country experts, and the extent to which courts test levels of religious knowledge and practice in order to gauge the sincerity and truthfulness of religion-based asylum claims. In a third and final section, the article discusses the different approaches to religion-based asylum claims favoured by the courts, with a particular emphasis on which features of religion have been decisive to their decisions, and the correlations between these features and the freedom of religion or belief, as it is protected in the International Covenant on Civil and Political Rights, article 18.

2. Refugee Status Determination Procedures in Canada and Norway

Due to the widespread influence of the 1951 Refugee Convention as the defining international instrument in the area of refugee protection, status determination procedures worldwide share numerous features derived from the incorporation of the convention in domestic legislation. Earlier studies have shown the fruitfulness of an issue-specific comparative approach, where the interpretation and application of international norms from specific parts of the Refugee Convention in different domestic jurisdictions have yielded important finds.\(^1\) The dominance of the issue-specific, cross-jurisdictional comparative approach is attested to by its frequent utilization in James C. Hathaway and Michele Foster’s *The Law of Refugee Status* (1991/2014), arguably the most important and heavily cited publication in the field of refugee law (see below).\(^2\)

Refugee status determination procedures in Norway and Canada share a number of important characteristics. Both countries have adopted separate domestic legislation to give effect to the Refugee Convention, and both have revised their legislation on this topic since

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1 One particularly important inspiration for the application of this approach in this article is Millbank J, ““The Ring of Truth”': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1.
the turn of the millennium in order to adapt to changes in arrival patterns. Both countries are among the top financial contributors to the United Nations High Commissioner for Refugees (UNHCR), are members of its Executive Committee, and grant the agency an important role in their status determination procedures.

Similarities notwithstanding, Norwegian and Canadian asylum procedures diverge in several important respects. First, the legal system of Norway is a mixture of civil and common law, while Canadian law is based on the English common law tradition, but with a separate civil law system in place for the French-speaking Quebec region. Although Canada has a federal system where states have some autonomy, this has no substantial impact on the asylum assessment procedure, which is under federal jurisdiction.

Second, the appeals mechanism is different in the two countries. The procedures for status determination and appeals have been separate in Norway since the creation of the Norwegian Immigration Board of Appeals (UNE) in 2001, “a court-like” entity set to review appeals to decisions made by the Norwegian Directorate of Immigration (UDI). In Canada, the status determination procedure and its appeals mechanism were handled by the same entity under the Immigration and Refugee Board of Canada (IRB) until 2012, when a separate Refugee Appeal Division (RAD) was created in order to process appeals. The appellate court systems also differ: Whereas the Norwegian system allows the court of appeal to decide cases, the Canadian Federal Court either sustains or returns cases back to differently constituted panels of the RAD for new consideration, frequently due to technical or interpretational errors.

Third, the political and public perception of migration in Norway and Canada has historically been radically different, but may now seem to be converging. Originally a migration-producing country with large sections of the population emigrating in the 1800s, Norway has only received migrants of any significant number since the 1970s, initially through temporary work visas for South Asian workers and their families, and later through the admission of different waves of immigrants through the acceptance of gradually increasing quotas of refugees whose status had already been decided by the UNHCR. Following a gradual increase in undetermined asylum seekers over the course of the 1980s, UDI was created in 1988 as part of the first Norwegian Immigration Act. Immigration has been a controversial topic in Norwegian public and political life since the very first arrivals, with numerous debates on cultural, economic and demographic aspects. Throughout the short Norwegian history of receiving migrants, security concerns have been a perpetual concern in the public sphere, with a significant upswing following the 2001 terrorist attacks on the US,

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3 Canada adopted its present act in 2002; Norway in 2008. Both acts have since been amended, and are topics of continuous debate, particularly with the dramatic change in migration flows in 2015.

4 The Norwegian Act on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm [Immigration Act, 15.05.2008 no. 35] §98 incorporates the requirement in the Refugee Convention §35 that contracting parties to the convention undertake to cooperate with the UNHCR. Similar provisions can be found in the Canadian Immigration and Refugee Protection Act (IRPA, S.C. 2001, c. 27) at sections 110 and 166. See also Goodman B, ‘The Immigration and Refugee Board of Canada’s Relationship with the UNHCR. A Factor of International Protection’ in James C Simeon (ed), The UNHCR and the Supervision of International Refugee Law (Cambridge Scholars Publishing 2013).

5 Immigration and Refugee Board of Canada: Refugee Appeal Division http://www.irb-cisr.gc.ca/Eng/Ref/App/pages/RadSar.aspx [03.11.2015].

6 From ca. 1825 to 1925, approximately 900 000 Norwegians emigrated, mostly to the US, representing a proportion of the population leaving the country only rivalled by Ireland. Nasjonalbiblioteket: Det laverike landet: Tidslinje http://www.nb.no/emigrasjon/t_timeline.html [03.11.2015].

7 The full title of the act is Act concerning the entry of foreign nationals into the Kingdom and their presence in the realm (24.6. 1988 no. 64). Translation accessed at University of Oslo: Translated Norwegian Legislation http://app.uio.no/ub/ujur/oversatte-lover/cgi-bin/sok.cgi?dato=&nummer=&tittel=utlending&type=LOV&S%F8k=S%F8k [accessed 03.11.2015].

8 For a general introduction to Norwegian immigration history, see Kjelstadli K (ed), Norsk innvandringshistorie (Pax 2003)
and with the domestic 2011 terror attacks against government headquarters and the Worker’s Youth League camp at Utøya, leading up to a vitriolic debate on the borders between legitimate criticism of the consequences of immigration and illegitimate hate speech targeting specific subgroups in society.⁹

Canada, on the other hand, is a nation whose modern territory was established by a mixture of invasions, conquest and mass migration from Western Europe and into the sparsely populated Northernmost extremes of the American landmass. Starting with French and British incursions into modern-day Canada in the 16th century and leading up to the full independence of the modern nation state of Canada in 1982,¹⁰ large-scale population movements have been the norm. The entrenchment of diversity in Canadian politics is attested to by the adoption of the 1988 Multiculturalism Act, in which the official government policy of multiculturalism, announced as early as 1971, has found its most concrete expression. Over the course of the last decades, however, public support for immigration, which has traditionally been robust, has become more mixed, with recent studies reporting an increased emphasis on dangers, fears and troubles brought about by increased immigration.¹¹

3. Finding Religion

Religion-based asylum claims are at the heart and center of the protection offered by the Refugee Convention. Compared to the other grounds for protection listed in the Convention Article 1(A)2, ‘race, (…) nationality, membership of a particular social group or political opinion’, claims for protection based on religion present decision makers with a set of unique challenges. Less “inherent” than traits like race or nationality, yet more profound and integral than political opinion, religion-based asylum claims require assessments that are attentive to the different modes of religion-based protections offered in international human rights instruments, while also engaging the large and unwieldy discussion of the exact contents of the term “religion”.

International human rights instruments offer three different but interrelated religion-based protections. First, the freedom of religion or belief is enshrined in article 18 of the International Covenant on Civil and Political Rights (ICCPR, 1966).¹² The freedom of religion or belief only allows for a strict and specific list of limitations to the “manifestations” protected by the right.¹³ Limitations must not only be prescribed by law and necessary to protect public order and safety, morals, health or the rights and freedoms of others, but can only be imposed if they are proportional to pursue a legitimate aim and are necessary in

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¹² See Article 18(3) of the ICCPR: “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

democratic societies.\textsuperscript{14} According to Hathaway and Foster, limitations beyond this list clearly fall under the notion of persecution.\textsuperscript{15}

Second, the right to enjoy all human rights without distinctions of any kind, such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ is enshrined in article 2 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).\textsuperscript{16} Additionally, the UN General Assembly contemplated a specific instrument for the protection against racial and religious discrimination in the 1960s,\textsuperscript{17} but the final convention approved by the assembly only recognized racial discrimination, leaving the protection of religious discrimination to a non-binding declaration adopted in 1981.\textsuperscript{18} The scope of “religion” for equality legislation remains underdetermined, but its correlation to ethnicity and racial identity is clear, particularly in the practice of the committee monitoring the International Convention on the Elimination of Racial Discrimination, which has increasingly addressed the “intersectionality” between religion and race.\textsuperscript{19} While it is firmly established that the notion of religion in anti-discrimination law is informed by the scope of freedom of religion enshrined in article 18 of the ICCPR,\textsuperscript{20} the correlation between religion, race and ethnicity seems to suggest a broader remit for religion which would also include issues of identity and belonging.

Third, the rights of ethnic, linguistic or religious minorities to “enjoy their own culture, to profess and practise[sic] their own religion, or to use their own language” is expressly protected in article 27 of the ICCPR. Although “profess and practise” strongly resembles the terminology of article 18 of the ICCPR, the Human Rights Committee has been clear that the article establishes and recognizes a right that is ‘conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.’.\textsuperscript{21} Despite this unequivocal assertion, Nazila Ghanea has observed that the rights of religious minorities are frequently addressed under the “freedom of religion or belief umbrella”, and not as a separate and distinct category of rights.\textsuperscript{22} Unlike the rights to freedom of religion or belief and anti-discrimination, minority rights presuppose a certain level of

\begin{itemize}
\item \textsuperscript{14} While the notion of democratic order is not specified in the ICCPR, it is trite law that the limitations listed in article 18(3) conform to the general requirement to limitations in international human rights law. See Badar ME, ‘Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments’ (2003) \textit{7 The International Journal of Human Rights} 63, 64
\item \textsuperscript{15} Hathaway JC and Foster M, \textit{The Law of Refugee Status} (Cambridge University Press 2014), 267
\item \textsuperscript{16} The right to equality is also protected in a wide number of additional international and regional human rights instruments.
\item \textsuperscript{17} See Sullivan D, ‘Advancing the Freedom of Religion or Belief Through the Un Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) \textit{82 American Journal of International Law} 487
\item \textsuperscript{18} United Nations General Assembly: “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief” (A/RES/36/55), 25 November 1981.
\item \textsuperscript{21} Human Rights Committee. \textit{General Comment adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.5)}, 26 April 1994.
\end{itemize}
positive state involvement in order to maintain and uphold the minority group in question, on
the presumption of earlier mistreatment.\textsuperscript{23}

Despite the prevalence of provisions on religion in international human rights law, the
term itself is consistently left undefined by decision makers, experts and scholars alike. This
unwillingness, while paralleled by a similar reluctance to pin down the exact contents of
“religion” in the humanities and social sciences,\textsuperscript{24} is arguably at the core of the freedom of
religion or belief, whose key characteristic is the sovereign right of each individual to observe,
maintain and manifest the religion, conscience or belief of his or her own choice.

Recognizing that religion-based claims rely on outer limits in order to be applicable,
however, presupposes some more or less clearly stated criteria for their identification. Heiner
Bielefeldt, former UN special rapporteur on the freedom of religion or belief (2010-2016) has
observed that it seems “inevitable” to insist on some formal criteria, while also stressing that
such criteria should “remain open (...) so as to allow for the inclusion of different
manifestations of these existential convictions and ritualistic or ethical practices”.\textsuperscript{25}

Discussing the application of the anti-discrimination provision of the ICCPR article 2, Theo
van Boven has maintained that the right primarily prohibits differential treatment based “on
the grounds that he or she belongs or does not belong to a certain religion or belief”,
expanding the belief-oriented notion of religion in article 18 to also encompass notions of
belonging and community.\textsuperscript{26} On the identification of what constitutes religious minorities,
Nazila Ghanea has pointed out that “there would need to be some interrogation of ‘religion’
and ‘belief’ in order to ensure it is more than a façade”, opting for an approach that is
attentive to the sense of “solidarity” within minority communities, echoing the sentiments of
UN minority rights rapporteur Francesco Capotorti.\textsuperscript{27}

Taken together, the inexact scope of “religion” in international human rights law
provides little in the way of guidance as to the scope of “religion” in the Refugee Convention,
apart from demonstrating its complexity. While the nexus to the freedom of religion or belief
and, \textit{inter alia}, the right to non-distinction in articles 18 and 2 of the ICCPR is undisputed,
and also explicitly mentioned in the UNHCR Handbook on the refugee status determination
procedure,\textsuperscript{28} the relevance of the rights of religious minorities under article 27 to the refugee
status determination procedure is less clarified. This state of affairs is somewhat paradoxical,
as the majority of religion-based asylum claims are likely to be lodged by individuals who
claim adherence to a minority religion, which have traditionally suffered extensive human
rights violations at the hands of majority communities.

Observing these definitional ambiguities, T. Jeremy Gunn has proposed three “facets”
of religion that are particularly important in the context of persecution and discrimination, in

\textsuperscript{23} Henrard K, ‘Boosting Positive Action : The Asymmetrical Approach towards Non-
Discrimination and Special Minority Rights’ (2011) \textit{71 Heidelberg Journal of International Law} 379, 388
\textsuperscript{24} The inability and unwillingness of scholars within religious studies and related disciplines to provide a final
definition of “religion” is well known, persistent and unlikely to go away any time soon. For brief overviews of
the definitional struggles, see Baird RD, \textit{Category Formation and the History of Religions} (The Hague 1971),
Smith JZ, ‘Religion, Religions, Religious’ in Mark C Taylor (ed), \textit{Critical Terms for Religious Studies} (Chicago
2006).
\textsuperscript{25} Bielefeldt H, ‘Misperceptions of Freedom of Religion or Belief’ (2013) \textit{35 Human Rights Quarterly} 33, 40
\textsuperscript{26} Boven T Van, ‘Racial and Religious Discrimination’, \textit{Max Planck Encyclopedia of Public International Law}
\textsuperscript{28} United Nations High Commissioner for Refugees: \textit{Handbook and Guidelines on Procedures and Criteria for
Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees
order to aid decision makers in the determination of religion-based asylum claims. Gunn has suggested that religion-based asylum claims should be approached through a “polythetic” definition that combines assessments of belief, identity and way of life, neither of which is necessary, nor sufficient conditions for the assessment. While “belief” clearly correlates with the freedom of religion or belief, “identity” and “way of life” can be more loosely associated with the right to non-distinction and the rights of religious minorities. This subdivision of the significant dimensions of religion has become authoritative in refugee status determination procedures, following their wholesale incorporation into the UNHCR guidelines on religion-based claims (see below).

3.1 The Study
The findings presented below are based on a study conducted in 2016 of approximately 70 appellate court cases reviewing refugee status determination decisions involving religion-based asylum claims in Norway and Canada and decided between 2010 and 2015. The key purpose of the study has been to assess how courts approach “religion” in their decisions. This question is explored below through examinations of the standard of review, the use of precedent, the role of legal literature and international human rights norms and narratives presented by claimants, the influence of testimonies from pastors, co-congregants and country experts, and the role of claimants’ religious knowledge, practice and level of sincerity and reflection.

3.2 Standard of Review
In their assessments of the proper standard of review in refugee status determination cases, the appellate courts have been deferential towards former decisions of superior courts, which have stressed the need to adopt a low threshold of likelihood due to the potentially devastating consequences of an erroneous decision. For the Norwegian court, the threshold has been described as ‘somewhat likely’, clearly distinct from the more general level of likelihood in civil court cases, which tend to gravitate towards a ‘more likely than not’ standard. For the Canadian court, the threshold is similarly set low, albeit more specifically phrased, with the court set to review whether the decision of the refugee tribunal could be conceived of as ‘reasonable’, in the sense that it could be considered ‘justifiable, transparent and intelligible.

30 Apparently curtailing the authority of his own claim, Gunn maintains that “In a religious discrimination case or in a religious persecution claim under refugee law, it could be expected that any of these three facets might be of relevance. It is of course also possible that any combination of the three may occur, or that some other facet of religion not identified here may be present, although these three are those most likely to be involved.”
32 Canadian court cases have been retrieved from The Canadian Legal Information Institute, https://www.canlii.org/en/. Canadian legal texts and circulars have been retrieved from the Immigration and Refugee Board of Canada, http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx. Norwegian court cases and legal texts have been retrieved from the Lovdata foundation, https://lovd.no/info/information_in_english. Norwegian circulars and guidance notes have been retrieved from The Immigration Appeals Board, http://une.no/en/ and the Norwegian Directorate of Immigration, https://www.udi.no/en/. While some of the Norwegian legal material has been retrieved from the database of translated Norwegian legislation maintained by the Law Library at the University of Oslo, http://app.uio.no/ub/ujur/oversatte-lover/english.shtml, the majority of translation has been done by the author.
33 LB-2012-143613, 12.03.2013, 7.
and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.\textsuperscript{34}

The threshold for which aspects of the decision made by the lower tribunal should be subject to review varies between the courts. The Norwegian court is frequently reluctant to overrule the tribunal on issues that it considers to be at the core of the specialized competence of the tribunal, although the determination of which issues belong to this core varies from case to case. In particular, the Norwegian court only rarely contests or seeks out alternatives to the country of origin information (COI) provided by \textit{Landinfo}, the COI unit within the refugee agency. Relying heavily both on the information contained in reports published by the unit and the testimonies of expert witnesses representing the unit, the court tends to defer extensively to their authority, in particular related to the level of ‘reflection’ that can and should be expected from alleged converts.\textsuperscript{35} The Canadian court has been clear that the assessment of the Immigration and Refugee Board on credibility is due ‘significant deference’,\textsuperscript{36} but has intervened whenever it has found the Board to be ‘unreasonable’.\textsuperscript{37} The Canadian court has shown no comparable deference to the COI assessment of the tribunal, as the COI unit of the Immigration and Refugee Board is differently constituted from \textit{Landinfo}, and does not provide expert testimony in court cases.

\textbf{3.3 Precedents and legal sources in the religion assessment}

In their review of refugee status determination decisions by lower tribunals, the appellate courts have relied primarily on domestic legal precedent. To the Canadian court, the landmark religious freedom decision of the Supreme Court of Canada (SCC) in \textit{Amselem} (2004)\textsuperscript{38} serves as the authority on the subject matter to be scrutinized in cases relating to religious claims in general. In the decision, the SCC reviewed the constitutionality of a by-law prohibiting excessive religious displays on the balconies of an apartment building. The court decided that the veracity, accuracy or orthodoxy of the religious claims inspiring the creation of such displays could not be assessed by the court, necessitating the introduction of some other, more neutral test that would be acceptable to believers and non-believers from a variety of different persuasions alike.

In its reasoning, the court found in favor of the claimant, not because his beliefs that creating a Jewish \textit{succah}, or tent, on his balcony was in line with ‘correct’ or authoritative Orthodox prescriptions for believers, but because of the sincerity of his own, personal belief that such a structure was necessary. Through this ‘turn to subjectivity’, the Supreme Court sought to incorporate a ‘lived religion’ approach to the freedom of religion or belief that was sensitive to the ways people actually believed in and practiced their religion.\textsuperscript{39}

Although only three of the reviewed decisions of the appellate court discuss \textit{Amselem} specifically,\textsuperscript{40} numerous cases show how the level of sincerity displayed by claimants override their perceived level of knowledge. While the court has stopped short of connecting the issues under review directly to the freedom of religion or belief as enshrined in article 18

\textsuperscript{34} \textit{Gilbert Cruze v. The Minister of Citizenship and Immigration}, [2015 FC 1256], 11.05.2015, 21. The standard is derived from the Supreme Court decision \textit{Dunsmsuir v New Brunswick}, [2008] 1 SCR 190.

\textsuperscript{35} This is particularly the case for Afghan claimants, whose conversions are assessed using a threshold developed by the Afghan country experts at \textit{Landinfo}. See more below.

\textsuperscript{36} \textit{Xin Cai Hou (a.k.a. Xinciai Hou) v. The Minister of Citizenship and Immigration} [2012 FC 993] 14.08.2012, [7].

of the ICCPR, its continued reliance on the terminology applied in Amselem intimates an approach that sees ‘religion’ within the Refugee Convention and inter alia the Immigration and Refugee Protection Act as strongly correlated to the right to religious freedom, albeit more in its Canadian Charter of Rights and Freedoms iteration, rather than the authoritative body of international law on the subject.

The Norwegian court has not cited domestic precedent that is not directly related to the determination of refugee status. The Supreme Court decision in Rt-2012-494 (Gay claimant),\(^{41}\) where an Iraqi claimant was granted protection for fear of persecution for his homosexual orientation, has been frequently called upon by claimants, but its applicability for religion-based claims has consistently been dismissed by the court.\(^{42}\) In the decision, the Norwegian Supreme Court relied on the reasoning in the much cited UK Supreme Court decision HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department (2010, UKSC 31), to discuss whether claimants could be expected to hide the characteristic potentially causing persecution or not, the so-called ‘discretion’ requirement.\(^{43}\)

In order to answer this question, the court reasoned, decision-makers have to adopt a three-step test.\(^{44}\) Initially, the question is whether claimants upon return will, as a matter of established fact, have the opportunity to avoid persecution by being discrete, modest or in other ways limiting their appearance or conduct. If available country of origin information suggests that such modifications of behavior will not diminish the risk of persecution, the claimant should be granted asylum. If such modification may lead to a diminished level of risk, however, the court will have to assess whether the claimant would be likely to modify his or her behavior solely in order to avoid persecution, in which case he or she should be granted asylum. Finally, however, if the court finds that the decision to modify behavior and thereby avoid persecution would most likely be taken in order to avoid personal shame or disgrace, the claimant should not be granted asylum.

In executive order GI-07/2012 to the Directorate of Immigration (UDI), the Ministry of Justice specifically ordered the Directorate to only apply the test in cases concerning persecution of “LGBTI claimants”, citing criticism from James Hathaway and Jason Pobjoy of the methodology underpinning the test applied in the case as the main rationale for this limitation (see below). The executive order is still in place, despite the promises of a new government coalition taking power in 2013, to ‘review and compare the processing of claims based on religion or membership in a social group with UNHCR guidelines and the EU status directive’.\(^{45}\) A review was conducted in 2015, finding that the three step test outlined by the Supreme Court in Gay claimant was not being applied by the Directorate, the Board or the Court of Appeals in cases concerning religion or membership in a social group.\(^{46}\)

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\(^{41}\) Rt-2012-494, 29.03.2012


\(^{44}\) Rt-2012-494, 29.03.2012, [57]


3.4 International courts
Decisions of international courts feature intermittently in the reviewed decisions as relevant sources of precedent. As in the case of domestic decisions, the relative scarcity of international precedent is partly due to the lack of relevant decisions at the international level dealing explicitly with cases of religion-based asylum claims. Unlike the Canadian court, which has primarily addressed the decisions of other common law jurisdictions like New Zealand, the Norwegian court is obliged to assess decisions of the European Court of Human Rights (ECtHR), and has also taken into account decisions of the European Court of Justice (ECJ). The Norwegian court of appeals has cited the 2012 Y and Z v. Germany decision of the ECJ to discuss the applicability of the three step test developed by the Norwegian Supreme Court in the Gay claimant case (see above). Y and Z was the first decision in which the ECJ discussed the scope of “persecution” in the EU Qualification Directive (QD). In the case, the ECJ found that violations outside the core aspects of the freedom of religion or belief could constitute persecution under the QD. Consequently, in order to avoid any future infringements of a widely conceived right to freedom of religion or belief, claimants could not be expected to modify or conceal any aspect of their religious belief or identity, regardless of the centrality of this to the worldview they subscribed to. In this way, the ECJ adopted an approach comparable to that of the Supreme Court of Canada in Amselem, seeking out a principle that would be more accommodating to ‘lived religion’ than adherence to more strictly formalized aspects of religious traditions.

Although the Y and Z decision explicitly specified that requirements for claimants to conceal their religious belief or identity would violate the QD, the decision did not distinguish between different motives for concealment. This deficit, which departs from the three step test developed by the Norwegian Supreme Court in Gay claimant, has been noted by the court of appeals, which has cited Y and Z to dismiss clear-cut requirements of discretion, while also specifying that self-imposed sanctions or a lacking need for outwardly practice would not lead to a need for protection. However, the court has also observed that the three step analysis developed in Gay claimant may very well be applicable to cases concerning religion-based persecution, because ‘it is hard to find real reasons why religious beliefs and practices should be considered differently from sexual orientation and practice’.

3.5 International Guidelines
Following up its more generally oriented Handbook on refugee status determination, the UNHCR regularly provides interpretational guidance on specific themes. The Guidelines on religion-based refugee claims, issued by the UNHCR in 2004, play a significant role in the

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47 Lipeng Yin v. The Minister of Citizenship and Immigration (2010 FC 544), 17.05.2010, [78]
48 Being outside of the European Union, Norway is not formally bound by the decisions of the ECJ. Nevertheless, by virtue of its participation in the European Economic Area agreement (EEA), Norway has implemented a number of EU directives, including the Qualification Directive (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)) relating to the refugee status determination procedure. Hence, as the top court interpreting the scope of EU directives, decisions of the ECJ are frequently reviewed by Norwegian courts when dealing with regulatory issues covered by the directives. 49 (C-71/11 and C-99/11)
50 (70)
51 (79)
53 Ibid.
54 See n28
55 See n30.
status determination procedure, and have been quoted several times by the Norwegian court. The Guidelines provide a general introduction to the notion of religion-based persecution, relying on input from papers contributed by human rights scholars Karen Musalo and T. Jeremy Gunn.

The Guidelines discuss different definitions of religion, stressing that the notion of ‘religion’ in refugee status determination procedures should be wide and inclusive, observing that persecution on religious grounds may very well happen ‘even if individuals adamantly deny that their belief, identity and/or way of life constitute a religion’ (paragraph 9); that ‘religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution’ (paragraph 13); and that forced compliance with religious education, attendance at religious ceremonies or the imposition of a particular legal or criminal code purportedly based on a religious doctrine could well be regarded as persecutory (paragraphs 21–22).

The Guidelines also highlight that general assumptions about a particular religion or its adherents should be avoided (paragraph 27c), that ‘knowledge tests need to take into account individual circumstances’ (paragraph 28), and that ‘[l]ess formal knowledge may also be required of someone who obtained a particular religion at birth and who has not widely practiced it’ (paragraph 31). The final section of the guidelines provides input on how decision-makers should assess post-departure, or sur place, conversion.

The Norwegian court has cited this section repeatedly, observing that post-departure conversion necessitates a ‘rigorous and in depth examination of the circumstances and genuineness of the conversion’ (paragraph 34), and that ‘[b]oth the specific circumstances in the country of asylum and the individual case may justify additional probing into particular claims’ (paragraph 35), relying on the authority of the UNHCR to legitimize a heightened level of scrutiny of religious convictions: Among the 8 Norwegian cases that explicitly cite the Guidelines, only one was decided in favor of the appellant.56 The Canadian court, on the other hand, has only cited the UNHCR Guidelines in two decisions, both of which were decided in favor of the appellant. Significantly, both of these decisions drew on paragraph 36 of the Guidelines to legitimize a further scrutiny of whether self-serving conversions could also give rise to international protection.57

3.6 Legal literature

The reviewed decisions only rarely touch upon legal literature in the determination of religion-based asylum claims. Assessing the scope of ‘persecution’, one Norwegian case has cited the Norwegian asylum law expert Vigdis Vevstad to the effect that not all human rights violations reach the level of persecution, necessitating a distinction from lesser violations and scattered instances of discrimination to reach the threshold of protection. The decision, however, omits a qualifying sentence from the original work by Vevstad that stresses the need to distinguish between different categories of violations under the assumption that some violations may more readily reach the threshold of persecution than others.59

The only author to appear in the decisions of both courts is James C. Hathaway. Hathaway’s work has been cited in one Norwegian decision\(^{60}\) in support of a strict interpretation of the precedential value of the *Gay claimant* decision. This interpretation, which was also referred to in executive order GI-07/2012 of the Ministry of Justice and Public Security (see above), was based on the article “Queer Cases Make Bad Law”, co-authored by Hathaway with Jason Pobjoy in 2012.\(^{61}\) The article criticized the *HJ and HT* decision of the UK Supreme Court, not for its outcome, but for its lack of clear and precise analysis and reasoning. Unlike *HJ and HT*, however, the *Gay claimant* case actually provided the analysis and rationale highlighted by Hathaway and Pobjoy, as the court assessed the precise likelihood of persecution for each part of its three-step analysis. Nevertheless, the executive order citing Hathaway and Pobjoy to limit the application of the discretion principle to LGBTI claims has been referred to in a number of cases, both by the Immigration Appeals Board (UNE) and the court.

The Canadian court, on the other hand, has discussed Hathaway’s observations on post-departure conversion claims from *The Law of Refugee Status* (1991) to defend a rigorous examination of such claims, not dissimilar from the use of the UNHCR Guidelines by the Norwegian court (see above). The majority of these citations, however, are used to refute the reliance of the Immigration and Refugee Board on a partial and selective citation that decisively changes the content of Hathaway’s views on the issue, portraying his approach as excessively restrictive. In *Huang v. The Minister of Citizenship and Immigration* (FC 2012 205), the court reproduced the citation of Hathaway by the IRB:

In this regard, the panel cites the following from James Hathaway’s *The Law of Refugee Status* with regard to “sur place” claims: An individual who as a stratagem deliberately manipulates circumstances to create a real chance of persecution which did not exist cannot be said to belong to this category. The panel finds, on a balance of probabilities that this claim has not been made in good faith.

FC 2012 205: para. 27

The court observed that the citation from Hathaway is not only lifted verbatim from a New Zealand decision that is also cited in the case, but also does not reflect the views of the following passages in Hathaway’s book, which stress the recognition that ‘conduct intended to create a risk of persecution may nonetheless ground a valid refugee claim, because that conduct will lead a state to impute a negative political opinion or disloyalty to the claimant’.\(^{62}\) In four cases,\(^{63}\) the court has chastised the IRB for its repeated reliance on this errant citation of Hathaway’s views of post-departure conversion claims.

### 3.7 The role of human rights standards

In the reviewed cases, the predominant conception of the ‘religion’ ground in the Refugee Convention has been derived from article 18 of the ICCPR. Both courts have stressed the distinction between religious freedom as a formal, legal principle and as a lived social reality, emphasizing the ruptures between law-on-the-books and law-in-action. While the Norwegian

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\(^{60}\) See LB-2014-164892, 09.10.2015


\(^{62}\) 2012 FC 205 at para. 29.


court has relied mostly on input from the Landinfo COI unit to assess the extent to which religious freedom is protected on the ground, the Canadian court has cited information from the International Religious Freedom Report issued annually by the US Department of State since 1999.

Although none of the courts have explicitly discussed the provisions of the ICCPR, the Norwegian court has frequently cited a section from the travaux préparatoires to the 2008 Norwegian Immigration Act using missionary work as an example of a form of rights violation that may not be tantamount to persecution. Although the original observation in the travaux was made as part of a discussion of whether the new law should specify which rights violations should be covered, with missionary work included as a generic example, the court has leaned on this particular passage to determine the scope of protection offered to missionary work in general, an interpretation that seems at best to be far-fetched. Indeed, read within its proper context, the travaux passage may be construed to indicate that restrictions upon missionary work, when seen in relation to other violations and assessed for their severity and consequences, may very well constitute persecution, a method of interpretation also relied on by the court in other cases.

Similarly, both courts have discussed the role of religious discrimination in the risk of persecution, generally finding that discriminatory aspects of policy, legislation and societal attitudes, while relevant to the assessment of the overall picture, can never in itself be sufficient to create a need for protection. As in the case of the freedom of religion or belief, the courts have addressed discrimination in general terms, without reference to the international regulatory framework on discrimination in the UDHR, the ICCPR or any of the other core human rights treaties. As such, the reviewed decisions do not discuss the distinction between indirect or direct discrimination, nor the potential for double, compound or intersectional discrimination for claimants belonging to different and overlapping vulnerable groups. Rather, the tendency of both courts in their discussions of discrimination is to find that because not all instances of discrimination are persecutory, it seems to follow that all instances of discrimination are non-persecutory.

## 3.8 Consistency and Timeline of events

Before addressing the content and scope of alleged religious convictions, both courts review the consistency of the overall narrative told by the claimant and the timeline of events presented to support the claim. Most claims of religious conversion take place at or around the point where an original asylum claim has been rejected, with both courts scrutinizing the elements, order and timing of each item at this critical juncture in the claim under review. Both courts consider the post-rejection timing of a claim of conversion to weaken the overall credibility of claimants. After a wave of conversions among Afghan asylum seekers in the mid-2000s, the Norwegian court has been particularly skeptical towards claimants from Afghanistan converting post-departure.

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64 See LB-2010-134086, 19.11.2012, 4, LB-2014-164892, 09.10.2015, 12, LB-2014-206175 25.06.2015, 6, 8
66 The rise in conversion claims coincided with a change in practice at the UDI, following fresh reports from Afghanistan suggesting that parts of the country was becoming more stable and secure. For an assessment of these cases, see Årsheim, Helge. “Legal Secularism? - Differing Notions of Religion in International and Norwegian Law”, in Trygve E. Wyller, Rosemarie Van Den Breemer &amp; Jose Casanova (eds), Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space. Göttingen: Vandenhoeck & Ruprecht, pp. 123 – 151.
Both courts have expressed their dismay with narratives that resemble that of earlier claimants, suggesting that ‘ready-made’ conversion narratives have been circulated and memorized among asylum seekers. For the Canadian court, the most frequently occurring sequence of events is that of Chinese claimants alleging some form of personal trouble leading to membership in a house church or Falun Gong circle in China that became subject to a raid by the FSB, with the claimant either narrowly escaping or being released by the security services after a brief interrogation. To the Norwegian court, claimants have repeatedly told how they became familiar with and understood the inherent values of Christianity in Greece, leading to baptism and a Christian orientation in either Greece or Norway. While neither of these standardized stories are suspicious in and of themselves, their prevalence has been regarded as potentially damaging to the credibility of claimants by both courts.

Assessing the timeline of events and the different steps in the process towards conversion, the Norwegian court has stressed the need to recognize that conversion can take many forms, ranging from long-ranging intellectual processes to more spontaneous, emotional experiences, including sudden, life-changing revelations. The review of religious conversion should therefore be conducted on the background of a careful consideration of the cultural background, educational level and language skills of each individual claimant. Whatever form the process leading up to conversion may take, however, the court has maintained that religious conversion is ‘an inner, and deeply personal process’, intimating a view of conversion that is closely aligned with the notion of religion in the freedom of religion or belief enshrined in article 18 of the ICCPR.

The Canadian court has not developed a similarly widespread, open-ended formula for its approach to the proper sequence involved in religious conversion. In the case of Yi Dong Fang, the court observed that the claimant ‘provided no evidence of a conversion-type experience’, without elaborating what kind of narrative would satisfy this criterion. In the more recent Gilbert Cruze case, however, the court observed that the Refugee Appeals Division ‘should not have been so quick to apply North American logic and reasoning to the applicant’s behaviour without giving consideration to his age, cultural background and previous social experiences’, intimating a broad-based view of the different contextual elements involved in the assessment of religious conversion.

Another critical item in the chain of events leading to claims of conversion is the timing of the specific switch from one religion to another within the overall narrative, and, in particular, the timing and influence of baptism or an equivalent confirmation of the alleged new faith on the overall claim of conversion. The courts have differed on the role of baptism, a ritual that the Canadian court has simply noted as an empirical fact, whereas the Norwegian court has gone to some length to examine whether the baptism was conducted in good faith and according to the rules of the religious tradition, discussing whether the proper grounds for baptism were actually in place at the time of baptism. The timing of baptism has also been

68 See Lipeng Yin v. The Minister of Citizenship and Immigration [2010 FC 544], 17.05.2010 [87-91], Xin Cai Hou (a.k.a. Xincai Hou) v. The Minister of Citizenship and Immigration [2012 FC 993] 14.02.2012 [65], Hao Wen Su v. The Minister of Citizenship and Immigration [2013 FC 518], 17.05.2013, [10],
70 See LB-2012-143613 03.12.2013, 10, LB-2012-166185 12.03.2014 10, LB-2014-131548 27.05.2015, 10, LB-2014-97419 06.05.2015, 11.
71 See LB-2012-166185 12.03.2014 10
72 Translated by the author. See LB-2014-131548 27.05.2015, 10
73 Yi Dong Fang v. The Minister for Citizenship and Immigration [2013 FC 241] 07.03.2013, [26]
74 Gilbert Cruze v. The Minister of Citizenship and Immigration [2015 FC 1256]
discussed by both courts, raising suspicion both if conducted too soon, and too late in the sequence of events leading to conversion.

3.9 Testimonies and affidavits
In order to assess the credibility of religious conversion, both courts rely on the input from a variety of witnesses, in particular co-congregants and leaders from the religious community in which the claimant has become a member. Both courts have underlined the limited perspective of witnesses on the broader questions of the case and the likelihood of witnesses to be emotionally and personally invested in the case as a significant factor in the weight of their testimonies. Nevertheless, the testimonies of witnesses are generally considered positive to the credibility of the claimant. Whereas the Canadian court rarely discusses the testimonies of witnesses in any greater detail, the Norwegian court has scrutinized the role of witnesses thoroughly, as a direct response to sustained attention in the Christian media, among politicians and among clergy and bishops of the Church of Norway to the treatment of religion-based asylum claims (see above). The attention was dealt with in some length in a 2014 decision of the Norwegian court, where the judge entered into a fairly extensive review of the potential role of clergy in assisting in the determination of the conversion claim.

Although the Canadian court has not seen a similar political attention towards the role of clergy as witnesses, the court has discussed the role of testimonies to some extent, arguing along the same lines as the Norwegian court, that pastors and co-congregants do not have access to the same ‘full picture’ as the courts, including the overall credibility assessments relating to earlier asylum claims. A peculiarity of the Norwegian court is its reliance on country of origin expert witnesses, which feature in every Norwegian appellate court case reviewed for this article. The expert witnesses are usually the same individuals, who work as designated country of origin experts for specific regions. Testimonies given by these experts are not limited to the situation on the ground in the country of origin, which is usually given in sweeping statistical terms, but also include assessments of what kind of decision a religious conversion would be to the claimant in question. This has particularly been an issue in the Afghan cases, where the assigned country of origin expert has been quoted in a number of cases on the ‘almost unthinkable’ nature of religious conversion for Afghans due to the all-pervasive role of Islam in the country, and the importance of the extended family network, whose dismissal of any signs of apostasy would mean social exclusion and impoverishment. Due to the considerable detrimental consequences of conversion, the expert witness has repeatedly stressed the importance of probing the rationale behind the decision to convert, with a particular emphasis on how the alleged conversion may affect the standing of the extended family network in Afghanistan.

3.10 Level of religious knowledge and practice
Religious knowledge and practice represents the most readily available, yet also most controversial topic for scrutiny and examination in conversion cases. Claimants that fail in either of these respects tend to stand a significantly weaker chance than claimants who can demonstrate a certain degree of familiarity with the core tenets of the faith in question and a fair amount of religious practice. Gauging the proper level of knowledge and practice among claimants can be a delicate affair, as it presupposes both a working knowledge of the religious beliefs and the dominant forms of practice associated with those beliefs by case workers and judges, and a consideration of how the specific situation of each individual claimant in terms of former experiences, age, maturity, level of schooling and personality may affect their level of knowledge and their modes of religious practice. Although the UNHCR Guidelines advise against rigorous knowledge tests, the examination of post-departure conversion claims
justifies a more in-depth assessment of claimants’ familiarity with basic tenets and level of religious activities (see above). A strict interpretation of international human rights standards on the freedom of religion or belief, and the ruling of the ECJ in *X and Y v. Germany* would seem to suggest considerable caution in the testing of religious knowledge and practice, as it will likely tend to gravitate towards the very religious orthodoxy that the right to freedom of religion or belief is created to protect.

In their assessments of the proper level of religious knowledge among claimants, both courts have stressed the need to avoid “closed” questioning on specific points of doctrine, recommending more open-ended questions that can elicit responses that give claimants the opportunity to explain their worldviews with their own words. The Canadian court in particular has chastised the IRB for questioning claimants on very precise aspects of the doctrines to which they claim allegiance. The Norwegian court has been skeptical of specific knowledge questions, pointing to the risk of claimants memorizing central aspects of doctrine regardless of the veracity of their conversion. Opting for more open-ended questions, the court has sought out accounts of how the doctrines in question affect claimants in their personal lives, emphasizing the extent to which the recently adopted faith differs from earlier beliefs held by the claimant.

In terms of religious practice, both courts relied extensively on the testimonies of co-congregation leaders, who have testified on the kinds of activities claimants have participated in. While the Canadian court has reviewed the level of religious practice as a fairly minor issue that is commonly subsumed under the overarching timeline of events, the Norwegian court has relied extensively on in-depth assessments of the level and nature of religious practice in Norway to forecast the expected level of activities upon return to the country of origin. This is particularly the case for Iranian claimants, whose mode of religious practice is decisive to the status of their claim, as the Norwegian court has relied on COI stressing the sharp distinction between the private and public sphere in Iran to develop a consistent practice of dismissing claimants whose religious activities can be sufficiently expressed in the private sphere. The level of religious practice required to meet the threshold of protection for Iranian claimants is uncertain, as no claimant has successfully won their case solely based on their projected level of religious activity upon return.

3.11 Level of reflection/sincerity

Despite earlier precedents from domestic and international courts, the battery of questioning on the timeline of events, testimonies and the scrutiny of religious knowledge and practice, most claims of religious conversion are decided on the question of ‘sincerity’ in the Canadian case and “level of reflection” in the Norwegian case. Claimants can be successful or unsuccessful in virtually every other aspect of the case, and still win or lose the case singularly on the question of whether they are, essentially, trustworthy and believable. While both sincerity and level of reflection resemble the ‘ring of truth’ criterion used in the assessment other asylum claims, they have specific, religion-related dimensions as well. For the Canadian court, the emphasis on sincerity can be traced to the Canadian Supreme Court decision in *Amselem* (see above), obliging the lower courts to deal with religion-related claims through assessments of *how* and *why* claimants develop their specific modes of religiousness, rather than scrutinizing the extent to which they comply with the more orthodox tenets of their adopted beliefs.

The Norwegian court has no comparable high court precedent, and has generally settled with the importance attached by UNE to the level of reflection evinced by the claimant. The level of reflection criterion, while peripherally related to the stress upon a rigorous examination of post-departure claims advised by the UNHCR Guidelines (see above), has been developed by UNE into a finely grained analysis of how well claimants can
explain the motivations and rationales behind their conversion. The analysis is described in some detail by UNE in its *Practice note on religious conversion claims* (2016). As such, “reflection” not only presupposes a working knowledge of the new religion, but also a certain level of knowledge of the former worldviews of claimants, and an ability to provide comparative analysis of the abandoned and adopted religions, complete with pros and cons for each case. Importantly, the reflection criterion not only requires a lot of analytical work from claimants, but also from UNE and the court, whose conception of each individual claimants’ former and recent religion and ability to synthesize their weak and strong points would require an intimate knowledge of the dominant conceptions of the religion held in the country of origin and a working knowledge of the basic features of the recently adopted religion in Norway.

4. Summary and Conclusion

Despite the less than decisive influence of international human rights norms on the assessment of religion-based claims, the conceptual structure of the freedom of religion or belief offered by article 18 of the UDHR and the ICCPR has been formative to the practical assessment of religion-based asylum claims, as recognized in the UNHCR *Handbook and Guidelines*. The modes of assessment suggested by the UNHCR and conducted by both the Canadian and Norwegian courts rely primarily on the distinction between beliefs, or the *forum internum* on the one hand side, and their ‘manifestations’, or the *forum externum* on the other hand side.

The importance of the internum/externum dichotomy is unevenly distributed: While the importance of a less clearly defined religious identity is frequently underlined as a significant aspect in the decisions, the question of religious conversion remains tethered to the notion of ‘belief’, although only rarely in the broad-based conception of belief stressed by the *Amselem* and *Y and Z. v. Germany* decisions (see above).

The deep-seated connection between ‘religion’ in the Refugee Convention and the notion of belief in the UDHR and ICCPR is not limited to the assessment of the credibility of religious conversion, but also spills over into the specific assessment of risk, which is more often than not tied to the level of religious practice, or ‘manifestations’ allowed in the country of origin. A key question in these deliberations, particularly to the Norwegian court, is the centrality of the manifestations in question to the claimant, and, *inter alia*, to the religion or belief in question.

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