

Case C-151/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

2 March 2022

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

16 February 2022

Appellants:

S

A

Staatssecretaris van Veiligheid en Justitie

Respondent:**Subject matter of the main proceedings**

Appeals against the decision of the rechtbank Den Haag (District Court, The Hague, Netherlands) declaring the appeal of foreign national S against the decision to reject her application for asylum to be well founded, and against the decision of the same court declaring the appeal of foreign national A against the decision to reject his application for asylum to be unfounded. The central issue in these cases is fear of persecution on the grounds of political opinion.

Subject matter and legal basis of the request

Interpretation of EU law pursuant to Article 267 TFEU. Interpretation of political opinion as a reason for persecution in Article 10(1)(e) of 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 (OJ 2011 L 337, p. 9; ‘the Qualification Directive’).

Questions referred for a preliminary ruling

1. Must Article 10(1)(e) of the Qualification Directive be interpreted as meaning that political opinion as a reason for persecution may also be invoked by applicants who merely claim to hold a political view, and/or to express such a view, without having attracted the negative interest of an actor of persecution during their residence in their country of origin and since their residence in the host country?

2. If the answer to Question 1 is in the affirmative, and a political view is thus sufficient to qualify as a political opinion, what weight must be given to the strength of that political view, thought or belief and to the importance to the foreign national of the activities stemming from it in the examination and assessment of an asylum application, that is to say, the examination of the reality of that applicant’s alleged fear of persecution?

3. If the answer to Question 1 is in the negative, is the criterion then that such a political opinion must be deeply rooted, and if not, what is the relevant criterion and how is it to be applied?

4. If the criterion is that the political opinion must be deeply rooted, can an applicant who fails to demonstrate that he or she holds a deeply rooted political opinion be expected to refrain from expressing that political opinion upon return to the country of origin, so as not to arouse the negative interest of an actor of persecution?

Provisions of EU law relied on

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 (OJ 2011 L 337, p. 9): Article 2(d), Article 6, Article 10(1)(b), (d) and (e), and Article 10(2).

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000): Article 29(1)

Voorschrift Vreemdelingen 2000 (Regulations on Foreign Nationals of 2000): Article 3.37a(a) and (b), Article 3.37(1) and (2)

Vreemdelingendecret 2000 (Circular on Foreign Nationals of 2000): Heading C2, Article 3.2

Succinct presentation of the facts and procedure in the main proceedings

- 1 Foreign national S, who comes from Sudan, arrived in the Netherlands on 21 January 2012. In her previous asylum applications and also in the present, fourth, asylum application, she has not argued that she already had a political opinion in Sudan and had been engaged in political activities. Nor has she argued that, even before her departure from Sudan, she had already attracted the negative interest of the Sudanese authorities and had left Sudan for that reason. The basis of her fourth asylum application is that she cannot return to Sudan because she will be persecuted by the authorities there for the political opinion she now expresses in the Netherlands, for example, by engaging in activities for the Umma Party, a Sudanese political party which coordinated the Sudanese revolution in 2019, and for the Darfur Vereniging Nederland (DVN), an organisation which champions the cause of the Darfur region. In addition, she submits, she has taken part in demonstrations in the Netherlands against the Sudanese Government and has expressed criticism of the Sudanese Government on Facebook and Twitter.
- 2 By decision of 30 August 2019, the Staatssecretaris (State Secretary for Justice and Security) rejected her asylum application on the ground that there was no evidence of a fundamental political opinion. In a ruling of 20 May 2020, the Rechtbank (District Court) upheld the appeal lodged against that decision by foreign national S. The District Court found that a political opinion does indeed exist. According to the District Court, however, it is unclear what exactly is to be understood by a fundamental political opinion. In any event, the District Court considers the strength of the opinion to be relevant. The State Secretary lodged an appeal against that ruling with the Afdeling bestuursrechtspraak (Administrative Jurisdiction Chamber) of the Raad van State (Council of State; 'the Afdeling'), the referring court. Foreign national S lodged a cross appeal, arguing that the strength of the opinion is not relevant.
- 3 Foreign national A, also from Sudan, arrived in the Netherlands on 20 July 2011. He became politically active in the Netherlands only after his first asylum application had been rejected and did not engage in any political activities prior to his departure from Sudan. He did not leave Sudan because of a political opinion. Foreign national A based his second asylum application (the present procedure) on, inter alia, the argument that he will be persecuted if he were to return to Sudan because he speaks openly and critically in the Netherlands about the political situation in Sudan and because he has stood up in the Netherlands for the rights of the Al-Gimir (a tribe in West Darfur).
- 4 By decision of 18 June 2020, the State Secretary rejected the asylum application of foreign national A on the ground that he had also failed to demonstrate that he had acted on the basis of a fundamental political opinion. In a ruling of 28 August

2020, the District Court declared the appeal lodged by foreign national A against that decision to be unfounded. Foreign national A lodged an appeal against that ruling.

Essential arguments of the parties to the main proceedings

- 5 According to foreign national S, the District Court wrongly considered that the strength of the political opinion is relevant to the asylum application. She argues that it does not follow from the Qualification Directive that a political opinion has to be ‘fundamental’ in order to qualify for protection.
- 6 The State Secretary argues that the District Court erred in finding that political opinion and religious opinion are by their nature separate grounds for persecution and must therefore be examined and assessed differently. According to the State Secretary, political opinion as a reason for persecution has to be examined and assessed in the same way as religious belief as a reason for persecution, with the result that it has to be shown that the opinion held by a foreign national is so determinative of his/her identity or moral integrity that he/she may not be asked to give it up or to conceal it after returning to his/her country of origin.
- 7 Against this, foreign national S argues that political opinion as a reason for persecution cannot be examined and assessed in the same way as religious belief as a reason for persecution. She maintains that the definitions of political opinion and of religious belief as reasons for persecution in Article 10(1) of the Qualification Directive differ from each other.
- 8 According to foreign national A, the District Court failed to appreciate that the decision was taken without due care because the State Secretary failed to examine and assess whether he, A, has a fundamental political opinion. He also argues that the District Court failed to appreciate that the State Secretary has no fixed policy for assessing an alleged political opinion, whereas that is in fact required in order to prevent any arbitrariness in the processing of asylum applications. He further submits that it does not follow from the Qualification Directive that a foreign national’s political opinion has to be fundamental in order to qualify for protection.
- 9 Against this, the State Secretary argues that, under the Qualification Directive, he has to assess whether the opinion held by a foreign national is fundamental, and therefore so determinative of his/her identity or moral integrity that he/she may not be asked to give it up or to conceal it after returning to his/her country of origin. He refers to, inter alia, the judgment of the present Afdeling of 21 November 2018, NL:RVS:2018:3735.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 Both cases involve foreign nationals who, only after their arrival in the Netherlands, started to express a political opinion and to engage in activities that could potentially arouse the negative interest of an actor of persecution in the country of origin, but which have not yet done so.
- 11 The main question to be answered in the present cases is whether, under EU law, the State Secretary should investigate and assess, as a condition for granting international protection, whether the political opinion invoked by the foreign national is of a particular strength.
- 12 This concerns the situation where the foreign national states that he/she has a well-founded fear of persecution if returned to his/her country of origin, because he/she has developed and expressed a political opinion and carried out political activities in the host country, even though this has not yet attracted any negative interest from the authorities in the country of origin, since they are not aware of that opinion and those activities. In this situation, the question arises as to whether the foreign national may be asked to exercise restraint after returning to his/her country of origin in order to avoid problems with the actor of persecution in that country.
- 13 The case-law of the Court of Justice does not yet provide an answer to this question. Nor does that case-law provide an answer to the question as to what criterion should be used to examine and assess the strength referred to.
- 14 In the view of the present Afdeling, religious belief and political opinion as reasons for persecution have in common that neither is based on inherent, immutable characteristics. The case-law of the Court of Justice on religious belief as a reason for persecution therefore sets out the lines along which the questions that arise in such cases should be answered.
- 15 It follows from the judgments of the Court of Justice of 5 September 2012, *Bundesrepublik Deutschland v Y and Z* (Joined Cases C-71/11 and C-99/11, EU:C:2012:518) and of 4 October 2018, *Bahtiyar Fathi* (C-56/17, EU:C:2018:803) that, with regard to religious belief as a reason for persecution, there must be an examination and assessment of whether a foreign national actually holds the belief invoked by him/her, what activities that belief gives rise to for him/her, and whether they are necessary or particularly important for him/her personally. It may also be inferred from these judgments that a foreign national who has not yet attracted the negative interest of an actor of persecution, but who claims to have a religious belief, may, by virtue of that very fact, be covered by that concept in Article 10(1) of the Qualification Directive. However, he/she may claim an entitlement to international protection on the basis of that belief and the activities arising from it only if they are particularly important to him/her in order to preserve his/her religious identity: the 'strength' of the belief.

- 16 It would therefore seem only reasonable, by analogy with the aforementioned case-law, also to set requirements for the strength of a political opinion. The question is whether that opinion must be so strong that it is plausible that, on his/her return to the country of origin, a foreign national will continue to carry out the activities which he/she undertook on the basis of that opinion in the host country, thereby accepting the risk of persecution – the stricter approach – or whether less far-reaching criteria should apply, whereby, as in the case of religious belief, the political opinion is examined in order to establish whether it has a particular strength, what activities it gives rise to, and whether it is necessary or particularly important in order to preserve the identity of the foreign national concerned. That opinion and those activities must be characterised by a certain degree of continuity and permanence that implies that the opinion has become deeply rooted within the foreign national.
- 17 The question as to whether the political opinion is deeply rooted must be the subject of careful examination. In doing so, the determining authority must also examine what activities motivated by that opinion are necessary for the foreign national, and what the consequences would be if the foreign national were to engage in those activities upon returning to his/her country of origin. The fact that he/she might nevertheless refrain from such activities in the country of origin because he/she would otherwise be exposed to the risk of persecution should not be held against him/her. Therefore, when assessing whether it is plausible that a well-founded fear of persecution upon return does exist, the possibility that a foreign national will exercise restraint in order to avoid persecution may not be taken into account if a deeply rooted political opinion exists. Conversely, however, the present Afdeling also assumes that if a foreign national does not make a plausible case that he/she has a deeply rooted political opinion, he/she may indeed be required to exercise restraint after his/her return to the country of origin and to refrain from activities that may arouse the negative interest of the authorities.
- 18 Since the Court of Justice has not yet provided an interpretation of political opinion as a reason for persecution in the light of an assessment of the merits of the fear of persecution on the part of a foreign national who has not yet attracted the negative interest of the authorities in the country of origin, and as the answers to the questions in these cases are not ‘*clair*’ or ‘*éclairé*’, there is reason to refer certain questions for a preliminary ruling.