

ECtHR ? M.E. v. Sweden, Application No. 71398/12

Country of Applicant:

Libya

Date of Decision:

26-06-2014

Citation:

M.E. v. Sweden ? 71398/12

Court Name:

Fifth Section; European Court of Human Rights

Keywords:[Credibility assessment](#) [1][Family reunification](#) [2][Persecution \(acts of\)](#) [3][Sexual orientation](#) [4]**Relevant Legislative Provisions:**Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 3](#) [6]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 8](#) [7]**Headnote:**

ECtHR majority rules that the temporary return of a homosexual man from Sweden to Libya would not violate Article 3 as short term concealment of sexual orientation would be tolerable in order to reduce risk of persecution.

Facts:

The applicant, a Libyan national who had been living in Sweden since 2010, applied for asylum there initially on the grounds that he feared persecution because of his involvement in the illegal transportation of weapons. Some months later he raised an additional ground for asylum stating that he was homosexual and had married a man. As to the original ground for his asylum request, he accepted that in view of political changes in Libya, he would probably no longer be in danger there. The Migration Board rejected his request because he had given contradictory statements and his story lacked credibility. It found no obstacle to his returning to Libya to apply for a residence permit in Sweden on account of his family ties and marriage. The Migration Court

dismissed his appeal after finding that he was not in need of international protection and that his story was not credible.

Decision & Reasoning:

The Court stresses that what is at issue in the present case is not a final decision by the Swedish authorities to grant or to refuse the applicant a residence permit based on family ties. No decision thereon has yet been taken.

The Court first acknowledges that it is often difficult to establish, precisely, the pertinent facts in cases such as the present one and it accepts that, as a general principle, the national authorities are best placed to assess the credibility of the applicant if they have had an opportunity to see, hear and assess the demeanour of the individual concerned.

The Court reiterates that the national authorities found that the applicant lacked credibility since he altered and escalated his story during the proceedings. In the Court's view, the applicant has not given a satisfactory explanation of why he has changed and added to his story over time.

Consequently, noting his changing submissions to the national authorities about his sexual orientation and who knew about it, the Court considers that the applicant has not given a coherent and credible account on which to base its examination of his claims.

Having regard to the country information on Libya, the Court notes that, since the overthrow of Gadhafi in 2011, the situation in Libya has been, and continues to be, insecure and unclear as to the direction the country is taking. Consequently, there is also only little and varying information about the situation for homosexuals in Libya, making it difficult for the Court to make an evaluation of this matter.

Although it is clear that homosexual acts are punishable by imprisonment under the Libyan Penal Code, the applicant has not presented, and the Court has not found, any information or public record of anyone actually having been prosecuted or convicted under these provisions for homosexual acts since the end of Gadhafi's regime in 2011.

The Court stresses that the present case does not concern a permanent expulsion of the applicant to his home country but only a temporary return while the Migration Board considers his application for family reunion. According to the Swedish Government, the applicant can request priority treatment of his application for family reunion and he can also submit his application through the Migration Board's online system which would speed up the process and reduce the waiting time to approximately four months. In the Court's view, this must be considered a reasonably short period of time and, even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time. Thus, it cannot by itself be sufficient to reach the threshold of Article 3 of the Convention.

While the Court notes that there is currently no Swedish representation in Libya, it reiterates that the applicant can complete his application for family reunion online. He would thus only have to travel to a Swedish embassy in a neighbouring country for the actual interview which could be done in a few days. In such a short time-frame, the Court finds no reason to believe that the applicant's sexual orientation would be exposed so as to put him at risk of treatment contrary to Article 3 of the Convention in Algeria, Tunisia or Egypt.

The Court concludes that substantial grounds for believing that the applicant would be exposed to

a real risk of being subjected to treatment contrary to Article 3 of the Convention if he had to return to Libya to apply for family reunion from there, have not been shown in the present case.

Outcome:

No violation of Article 3 and alleged violation of Article 8 is inadmissible

Subsequent Proceedings :

The applicant lodged a request for referral to the Grand Chamber, which was accepted on the 17 November 2014.

Pending the Grand Chambers judgment the Migration Board reassessed the applicants claim following a deterioration of the security situation in Libya. Against this background, and a new domestic legal comment concerning the situation in Libya, the Migration Board found that the deterioration in security alongside the applicant's homosexuality constituted a new circumstance. This subsequently led to the finding that, if returned, the applicant would be subjected to persecution on account of his homosexuality.

The Swedish government requested the Grand Chamber to, therefore, strike out the application in line with Article 37 para 1 of the Convention.

Noting that Sweden's own motion to grant a permanent residence permit to the applicant had effectively repealed the previous expulsion decision and, consequently, the threat of an Article 3 violation, the [Grand Chamber found](#) [8], in line with previous jurisprudence, (O.G.O. v. the United Kingdom) that the applicant no longer risked being expelled from Sweden. Accordingly, the matter had been resolved within the meaning of Article 37 § 1 (b) of the ECHR. Indeed, the Court found that the Migration Board had taken the applicant's homosexuality into account when finding that due to the deterioration of security the applicant would be at risk of persecution "since he lived openly as a homosexual and could be expected to continue doing so on his return".

Finding, therefore, that there was no need to retrospectively examine Sweden's responsibility under Article 3, the Court additionally surmised that there were no special circumstances relating to human rights that required an ongoing examination of the case. The Court, thus, decided to strike the case out of its list.

Observations/Comments:

Dissenting Opinion of Judge Power-Forde

The dissenting judge concludes that "[w]ith this judgment, the Strasbourg Court introduces a new test of 'duration' that is not to be found elsewhere in comparative European law". Citing the X, Y, Z judgment of the Court of Justice of the European Union, which holds that individuals cannot be expected to conceal their sexual orientation to avoid persecution, the dissenting judge states that "[w]hat counts is the fact of having to exercise greater restraint and reserve than would be required of a heterosexual in the expression of sexual orientation and not the length of time for which the discriminatory restraint and reserve would have to be endured".

The dissenting judge also highlights the United Kingdom Border Agency Country of Origin Information Report on Libya, dated 19 December 2012, which reports allegations of homosexuals in Libya being arrested, assaulted and beaten "simply for being homosexual".

Separate Opinion of Judge de Gaetano

The judge, who voted with the majority on this case, maintains that reference to the CJEU, Y, Z judgment on the effect that 'the criminalisation of homosexual acts *per se* does not constitute an act of persecution' could be seen as somehow undermining the standards earlier set by the ECtHR. He refers to the criminalisation of homosexual acts and the resulting violation of Article 8 (see *Dudgeon v. the United Kingdom* no. [7525/76](#) [9], 22 October 1981, §§ 40 to 46; *Norris v. Ireland* no. [10581/83](#) [10], 26 October 1988, §§ 38 and 46 to 47) and the consequent irrelevance, for the purpose of a violation of fundamental human rights, of whether or not such laws are in fact applied or applied sporadically.

Third party observations

-Amnesty International (AI) submitted a third-party intervention which focused on the right to family life for same-sex couples under Article 8 of the Convention and the right not to be discriminated against because of their sexual orientation. AI contended that coercing any individual to renounce their identity 'including fundamental components thereof' constituted in and of itself a gross violation of human rights.

- ILGA-Europe, FIDH and ICJ made a joint third-party submission. They argued that homosexual applicants for asylum had the right to be open in their country of origin about their sexual orientation and marital status and could not be expected to remain silent or discreet about these important aspects of their lives. Moreover, even when the exposure to the risk of persecution and ill-treatment was expected to be temporary, the period of expulsion was immaterial because the Article 3 right to be protected against such treatment was absolute. Lastly, in their view, even if an applicant was voluntarily discreet for *only* family or societal reasons, then the fact that he or she was required to present publicly elements of a heterosexual narrative to evade harm was in itself an Article 3 violation as it debased the human being and constituted degrading treatment.

http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf [11]

EDAL Journal article

For further information please see: <http://www.asylumlawdatabase.eu/en/journal/lgbti-asylum-seekers-discord-...> [12]

Case Law Cited:

[Ordinanza n. 15981 del 2012](#) [13]

[ECtHR - R.C. v Sweden, Application No. 41827/07](#) [14]

ECtHR - I.I.N. v. The Netherlands, Application No. 2035/04

[CJEU - C-199/12, C-200/12 and C-201/12, Minister voor Immigratie en Asiel v X, Y and Z](#) [15]

ECtHR - *Dudgeon v United Kingdom*, 22 October 1981, Series A no. 45

ECtHR - Nunez v. Norway, Application No. 55.597/09

ECtHR - Rodrigues da Silva and Hoogkamer v. Netherlands, Application No. 50.435/99

ECtHR - Hilal v United Kingdom, Application no. 45276/99

ECtHR - Mamatkulov Askarov v Turkey, Applications nos. 46827/99 and 46951/99

[CJEU - C-71/11 and C-99/11 Germany v Y and Z](#) [16]

[UK - Supreme Court, 7 July 2010, HJ \(Iran\) v Secretary of State for the Home Department \[2010\] UKSC 31](#) [17]

[ECtHR - Saadi v Italy, Application no. 37201/06](#) [18]

Attachment(s):



[CASE OF M.E. v. SWEDEN.pdf](#)[19]

Other sources cited:

13 January 2011 Head of the Legal Department of the Migration Board legal position concerning the method for investigating and considering the future risk for persons who rely on grounds for protection on the basis of sexual orientation (Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning)

Presidential Statement, dated 16 December 2013, of the United Nations Security Council

Libyan Penal Code, Articles 407 and 408

Interview by the online newspaper Pink News, 'Interview: Gays and the Libyan Revolution, before and after (part 1)?', published on 8 February 2012

Swedish Migration Board, 'Question ? Answer: the situation of homo- and bisexual persons in Libya?' [Fråga-svar: homo- och bisexuellas situation i Libyen], 30 September 2011

Asylum Research Consultancy, commissioned by the UNHCR, 'Libya Country report, dated 5 July 2013, Chapter 4.9)

13 February 2012, UN Watch ('Libya tells UN Rights Council: 'Gays threaten continuation of human race'?)

United Kingdom Border and Immigration Agency, 'Country of Origin Information Report on Libya?', dated 19 December 2012

23 October 2012 UNHCR 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees?.'

Algerian Penal Code (Ordinance 66-156 of June 8, 1966)

Tunisian Penal Code of 1913 (as modified)

Authentic Language:

English

State Party:

Sweden

National / Other Legislative Provisions:

Sweden - Utlänningslagen (Aliens Act) (2005:716) - Chapter 4 Section 2

Sweden - Utlänningslagen (Aliens Act) (2005:716) - Chapter 5 Section 1

Sweden - Utlänningslagen (Aliens Act) (2005:716) - Chapter 12 Section 1

Links:

[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A24

[2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2482

[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A54

[4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2448

[5] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[6] https://www.asylumlawdatabase.eu/node/195#toc_12

[7] https://www.asylumlawdatabase.eu/node/195#toc_46

[8] <http://hudoc.echr.coe.int/eng?i=001-153914>

[9]

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["7525/76"\];}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["7525/76"];})

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[11] http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf

[12] <http://www.asylumlawdatabase.eu/en/journal/lgbti-asylum-seekers-discord-between-european-courts>

[13] <https://www.asylumlawdatabase.eu/en/node/6037>

[14] <https://www.asylumlawdatabase.eu/en/content/ecthr-rc-v-sweden-application-no-4182707-0>

[15] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-19912-c-20012-and-c-20112-minister-voor-immigratie-en-asiel-v-x-y-and-z>

[16] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-7111-and-c-9911-germany-v-y-and-z>

[17] <https://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31>

[18] <https://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-italy-application-no-3720106>

[19]

<https://www.asylumlawdatabase.eu/sites/default/files/alddfiles/CASE%20OF%20M.E.%20v.%20SWEDEN.p>