ECtHR - F.G. v. Sweden (no. 43611/11) (Grand Chamber), 23 March 2016

Country of Applicant:
Iran

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F.G. v. Sweden, Application no. 43611/11, 23 March 2016

Court Name:
European Court of Human Rights (Grand Chamber)

Keywords:
Assessment of facts and circumstances [1]
Burden of proof [2]
Country of origin information [3]
Final decision [4]
Individual assessment [5]
Non-refoulement [6]
Protection [7]
Personal circumstances of applicant [8]
Inhuman or degrading treatment or punishment [9]
Refugee Status [10]
Refugee sur place [11]
Return [12]
Membership of a particular social group [13]
Persecution Grounds/Reasons [14]
Political Opinion [15]
Religion [16]

Headnote:
An Article 3 compliant assessment requires a full and *ex nunc* evaluation of a claim. Where the State is made aware of facts that could expose an applicant to an individual risk of ill-treatment, regardless of whether the applicant chooses to rely on such facts, it is obliged to assess this risk *ex proprio motu*.

Facts:
The applicant, an Iranian national, in 2010 applied for asylum in Sweden on the grounds that he had worked with known opponents of the Iranian regime and had been arrested and held by the authorities for small periods of time on at least three occasions between 2007 and 2009, notably in connection with his web-publishing activities and participation in demonstrations. He said that he had fled from Iran instead of obeying a summons order and appearing before the revolutionary Court to cooperate with the authorities against his friends.

After arriving in Sweden, he had converted to Christianity. However, he stated that the conversion was a private matter and he did not want to base his asylum request on it.

His request for asylum was rejected by the Swedish migration board, which considered the applicant?s alleged political activities of little credibility and in any case too limited to constitute a source of serious risk upon return. With regards to his new religious beliefs, the migration board noted that the applicant had not wished to invoke his conversion as a ground for asylum and that pursuing his faith in private was not a plausible reason for believing that he would risk persecution upon return.

The applicant?s appeal against the decision was also dismissed by the Migration Court. Indeed, even if the applicant?s political activities were deemed credible, they were in any case considered only peripheral and insufficient to substantiate a real and concrete risk of ill treatment if he was returned to Iran. In addition, the Court based its decision on the grounds of the applicant?s refusal to rely on his religious conversion to justify his asylum request. Indeed, although the applicant seemed to have based the appeal on his conversion and he had submitted the baptism certificate, he had stated anew that he did not wish to rely on his conversion as a reason for asylum.

The applicant requested for leave to appeal before the Migration Court of Appeal. He explained that he had previously refused to take advantage of his conversion for the purpose of asylum in order not to tarnish his conversion. In addition, he submitted a letter from his new congregation that supported his explanation and the authenticity of his conversion. Moreover, he claimed that some of the religious services he had taken part in had been broadcasted on the internet and this had increased the chance of being recognised by the Iranian authorities. Nevertheless, the leave to appeal was denied.

Finally, the Migration Board dismissed the applicant?s request to stay the execution of the removal order and to re-examine his request for asylum based on the new circumstances of the conversion to Christianity. Indeed, the Board held that the circumstance of the conversion was not new, and that the applicant had already declined to make use of it for the purpose of the Asylum request.

The applicant then lodged an appeal before the ECtHR . The Chamber rendered its judgement on January 2014 [17] holding that the implementation of the expulsion order against the applicant would not give rise to a violation of Arts. 2 or 3 of the Convention. The Chamber found that the applicant?s political activities were too peripheral to substantiate a serious risk of persecution upon return in Iran. As to the applicant religious conversion, the Chamber noted the refusal of the applicant to ground his asylum request on this and held that there was no reason to believe that the Iranian authorities were aware of his conversion.

Decision & Reasoning:
Preliminary observations

As to preliminary observations, the Court neither struck the case from its lists of cases nor

declared it inadmissible, as requested by the Swedish Government.

As to the request to strike out the case, the Court recognised that the deportation order had expired under the Swedish Law (Alien Act) and could not be enforced, so that the applicant was not at risk of being expelled in the near future. This had led to the striking out of the application in previous cases by virtue of Art. 37(1)(c). However, the Court noted that in this case there were important issues involved which had an impact that went beyond the situation of the applicant. For this reason the Court found that Art. 37(1)was applicable in fine.

As to the request to declare the case inadmissible on account of the lack of the applicant?s victim status, the Court noted that even if the deportation order had lost effect, the applicant was in ?limbo?, since he was not granted any residence permit in Sweden. Indeed, he would inevitably remain in such an uncertain situation during any new asylum proceedings.

Persecution on grounds of political opinion

With regard to the applicant?s claim that the Swedish authorities had not taken into due account his political activities in Iran and the risks related to those, the Court found that Article 2 and 3 would not be violated on account of his political past in Iran if he were to be returned to the country.

The Court firstly underlined that the domestic authorities had in fact taken into account all numerous facts alleged by the applicant in this respect, among which for instance his friendships with some opponents to the regime and his arrests on three occasions.

Secondly, the Court endorsed the conclusion reached by the Swedish authorities regarding the low profile of the applicant?s activities against the regime, which were considered not sufficient to expose the applicant to risks meeting the standards of Art. 2 and 3 of the Convention. According to the Grand Chamber the factual circumstances of the applicant were completely different to previous cases, inter alia, S.F. and Others v. Sweden in which the applicant undertook extensive political activities and was surveyed by the Iranian regime.

As to the applicant?s allegation that the Iranian authorities could identify the applicant from the ECtHR judgments and persecute him on these grounds, this claim was equally dismissed by the Court. Indeed the Court highlighted that the applicant was granted anonymity from the beginning of the proceedings (interim measure under rule 39), and there were no strong indications of an identification risk based on the material provided to the Court.

Persecution on grounds of religion

As to the issue of the applicant's sur place religious conversion, the Court did not accept the argument that the applicant was not aware of the risks for converts in Iran, due to the fact that the applicant spoke English well, he had lived most of his life in Iran and therefore he had to be aware of its legislation (which prohibit apostasy with capital penalty). Nor was the Court convinced that the applicant was not provided with proper legal advice on the issue. Indeed, among other facts, the Court pointed out that during the hearing before the Migration Board the official even interrupted the meeting so that the applicant could confer with his counsel on this specific issue.

However, the Court acknowledged that, neither the Migration Board nor the Migration Court had carried out a thorough examination of the authenticity of the applicant?s sur place conversion, on how he intended to manifest it in Iran if the removal order were to be executed, and on the risks that he may encounter in Iran as a result of his conversion. The Swedish authorities had refrained

from doing so due to the fact that the applicant had declined to invoke the conversion as an asylum ground. Nevertheless, the Court accepted the argument put forward by the applicant who claimed the impossibility for an individual to waive the protection granted by art. 2 and 3 of the Convention. Indeed, on the one hand, the Court recognised that in asylum claims based on an individual risk the obligation to prove such a risk falls in principle on the applicant. Accordingly, if an applicant chooses not to disclose a specific ground for asylum, the State concerned cannot be expected to discover this ground by itself. On the other hand, the Court affirmed that if a contracting State is made aware of facts that could plausibly expose the asylum seeker to a risk of ill-treatment in breach of Arts. 2 and 3 of the Convention, considering the absolute nature of the rights therein protected, the State authorities have the obligation to carry out an ex nunc assessment of that risk of their own motion using all means at their disposal to produce necessary evidence in support of the application.

As to the case in hand, the Court found that the material presented before the administrative and judicial national authorities had sufficiently shown that the applicant?s claim for asylum on the basis of his conversion merits an assessment by the national authorities. In addition, the court noted that the CJEU, in the case A (C-148/13), B (C-149/13), C (C-150/13) v. Staatssecretaris van Veiligheid en Justitie, held that Art. 4(3) of the Qualification Directive and Art. 13(3)(a) the Procedures Directive had to be interpreted as precluding the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant had not relied on his declared sexual orientation on the first occasion he had been given to set out the ground for persecution. Since the circumstances of sexual orientation are a private feature of the applicant as much as a religious belief, the CJEU precedent was considered applicable also in the present case.

For all these reasons, the Court concluded that there would be a violation of Arts. 2 and 3 of the Convention if the applicant were to be returned to Iran without a thorough assessment by the Swedish authorities of the applicant?s conversion and of the related possible risks.

Outcome:
The Court held, unanimously, that the applicant?s return to Iran would not give rise to a violation of Articles 2 and 3 of the Convention, on account of the applicant?s political past in Iran.

However, the Court held, unanimously, that there would be a violation of Articles 2 and 3 of the Convention if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his religious conversion.

Observations/Comments:
The judgment was accompanied by several separate opinions.

1. In his concurring opinion, Judge Bianku underlined that the Swedish authorities had not adhered to the procedural obligation of an *ex nunc* analysis, also to be conducted in relation to *sur place* activities, and that such an obligation is well- established in ECtHR and national European case-law, as reported by the EDAL. Considering the obligation of *ex proprio motu* investigation by the Swedish authorities, Judge Bianku would have preferred the latter to be considered as a violation of Art. 3 of the Convention, instead of recognising only a potential future violation.

2. Judge Jäderblom expressed a concurring opinion as to the potential violation of Arts. 2 and 3 of the Convention and a dissenting opinion as to the preliminary justification for the examination of the case by the Grand Chamber.

With regard to the former, Judge Jäderblom (in this respect joined by Judge Spano) claimed that the Swedish authorities had not breached the shared duty of assessing the risks linked to the applicant *sur place* conversion in the event of his return to Iran, since the latter had never clearly affirmed the will of observing his new religious faith in an extrovert and therefore dangerous way in Iran. However, Judge Jäderblom acknowledged that the applicant had brought new material in this respect before the Court, and this revealed a risk of ill-treatment which the Swedish authorities should take into account in case of a new decision. For this reason, the Judge still voted as the majority for a potential violation of Arts. 2 and 3 of the Convention.

3. Judges Ziemele, De Gaetano, Pinto De Albuquerque and Wojtyczek expressed a separate opinion according to which there had been a violation of Arts. 2 and 3 of the Convention on account of the deportation on both substantive and procedural grounds.

As to the latter, the Judges highlighted that the Swedish authorities presupposed that the applicant would, or should, refrain in Iran from taking part in church services, prayer meetings and social activities. Nevertheless, this is clearly in contrast with the CJEU *judgment Bundesrepublik Deutschland v. Y. (C-71/11) and Z (C-99/11), the* UNHCR guideline on international protection, as well as the 2012 ?general legal position? of the Director General for Legal Affairs at the Swedish Migration Board concerning religion as grounds for asylum. Indeed, not only is the external manifestation of one?s faith an essential element of the very freedom protected by Article 9 of the Convention, but at least ? and certainly ? in the case of Christianity, bearing external witness to that faith is an essential mission and a responsibility of every Christian and every Church.

As to the substantial violation, the Judges stressed that the applicant?s conversion to Christianity is a criminal offence punishable by death in Iran. In addition to the risk of social persecution as a Christian , the applicant risks criminal prosecution for the crime of apostasy which judges can impute according to their own subjective understanding of Islamic law and prove it in accordance with evidential rules which are at odds with the basic tenets of equality and fairness. Furthermore, the Judges recalled that freedom of religion is protected by Article 18 of the Universal Declaration

Of Human Rights. For all these reasons they concluded that there had been a substantive violation of Articles 2 and 3 of the Convention on account of the deportation order issued against the applicant.

4. Judge Sajo, shared the conclusions of the separate opinion of Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek. However, he would have preferred a separate analysis of the extent to which the Convention right to manifest one?s religion freely has extraterritorial application.

The AIRE Centre (Advice on Individual Rights in Europe), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), intervened in the case by submitting their written observations [18].

The interveners maintained that:

1) A full and *ex nunc* evaluation is required in assessing the risk upon removal according to the Court case law.

2) Requiring self-enforced concealing of one?s religious identity is a denial of the right to freedom of religion and may entail an endogenous harm falling within the scope of Article 3 of the Convention; and this is confirmed by the CJEU case law. A different interpretation would be

inconsistent with the Refugee Convention.

For further analysis of the case see also the article published by Salvo Nicolosi [19] on ?Strasburg observers? website.

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ECtHR - K.K. v. France, Application No. 18913/11 [23]

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[30]

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Attachment(s):

CASE OF F.G. v. SWEDEN (G.C.).pdf[32]

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Authentic Language:
English

State Party:
Sweden

National / Other Legislative Provisions:
Sweden - Utlänningslagen (Aliens Act) (2005:716)

Links:
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