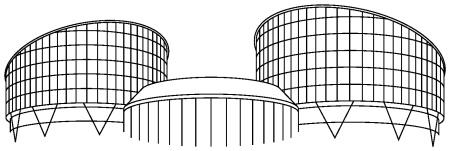

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF M.E. v. SWEDEN

(Application no. 71398/12)

JUDGMENT
(striking out)

STRASBOURG

8 April 2015

This judgment is final but may be subject to editorial revision.

In the case of M.E. v. Sweden,

The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Dean Spielmann, *President*
Josep Casadevall
Guido Raimondi
Işıl Karakaş
Elisabeth Steiner
Khanlar Hajiyev
Ján Šikuta
Dragoljub Popović
Päivi Hirvelä
Nona Tsotsoria
Kristina Pardalos
Julia Laffranque
Linos-Alexandre Sicilianos
Paul Lemmens
Paul Mahoney
Krzysztof Wojtyczek, *judges,*
Johan Hirschfeldt, ad hoc *judge,*

and Erik Fribergh, *Registrar,*

Having deliberated in private on 18 March 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 71398/12) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Libyan national, Mr M.E. ("the applicant"), on 3 November 2012. The President of the Fifth Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr D. Loveday, a lawyer, and Mr S.-Å. Petersson, a refugee officer, both working in Stockholm. The Swedish Government ("the Government") were represented by their Agents, Ms H. Lindquist and Ms K. Fabian, of the Ministry for Foreign Affairs.

3. The applicant alleged that his expulsion to Libya in order for him to apply for family reunion from there would entail a violation of Article 3 of the Convention.

4. On 12 December 2012 the acting President of the Fifth Section, to which the case had been allocated (Rule 52 § 1 of the Rules of Court),

decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be expelled to Libya for the duration of the proceedings before the Court.

5. On the same date the application was communicated to the Government.

6. Ms Helena Jäderblom, the judge elected in respect of Sweden, withdrew from the case (Rule 28 of the Rules of Court). Accordingly, the President of the Section decided to appoint Mr Johan Hirschfeldt to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

7. On 26 June 2014 a Chamber of the Fifth Section, composed of judges Mark Villiger, Ann Power-Forde, Ganna Yudkivska, Vincent A. De Gaetano, André Potocki, Aleš Pejchal and Johan Hirschfeldt, and also Claudia Westerdiek, Section Registrar, delivered a judgment in which it unanimously declared the complaint under Article 3 admissible and the remainder of the application inadmissible, and held by six votes to one that the implementation of the expulsion order against the applicant would not give rise to a violation of Article 3 of the Convention.

8. On 26 September 2014 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73. On 17 November 2014 the panel of the Grand Chamber granted that request.

9. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. Background and proceedings before the national authorities

10. The applicant was born in 1982 and lives in Sweden.

11. On 29 July 2010 he applied for asylum in Sweden, stating that he had entered the country three days earlier.

12. On 6 August 2010 the Migration Board (*Migrationsverket*) held a first interview with the applicant. An in-depth interview was held on 20 August 2010, at which the applicant's officially appointed counsel and an interpreter were present. The applicant stated essentially the following.

13. He had left Libya for Tunisia in April 2010, where he had remained until he had travelled to Sweden in July 2010, with the assistance of smugglers and a fake French passport. In Libya he had been a soldier, working as a guard at a military base in Tripoli where some persons had

paid him to transport illegal weapons for powerful clans with connections to the authorities. He had been working for them for more than a year when in November 2009 he had been stopped at a road check and then taken to an unknown location, where he had been subjected to interrogation and torture. He had been charged with possession of illegal weapons and car theft and had then been moved to a military prison. During the torture his arm had been seriously injured and, about two months after his transfer to the military prison, he had been taken to a civil hospital for treatment. After the doctor had treated him, he had managed to escape. If he were returned to Libya, he would risk at least ten years' imprisonment for the criminal offences. He would further risk being killed by the clans since he had revealed their names under torture.

14. The Migration Board officer asked whether the applicant had other grounds for requesting asylum, to which he replied no. He had lived well in Libya until he was arrested and had even planned to marry a woman in May 2010.

15. On 21 February 2011 the applicant added to his grounds for asylum that he was homosexual and had a relationship with a man, N., who held a permanent residence permit in Sweden. He had moved in with N. in December 2010.

16. At a supplementary interview on 1 November 2011 the applicant stated that he had previously been heterosexual but had become interested in N. No one in Libya knew about his sexual orientation and he had never had a homosexual relationship in Libya. He and N. had married in Sweden in September 2011. If he had to return to Libya to apply for family reunion from there, it would become known that he was married to a man and he would risk persecution and ill-treatment.

17. On 16 December 2011 the Migration Board rejected the application. It found, *inter alia*, that the applicant had given diverging information about his passport at the interviews, and also given contradictory statements about when he had met N. and about their relationship. It concluded that the applicant's story, in relation both to events in Libya and to his relationship with N., lacked credibility and was not sufficient to justify granting him a residence permit in Sweden. Furthermore, the Board noted that substantial changes had occurred in Libya after the applicant had left the country. It considered that he had failed to substantiate his claim that, on the basis of the criminal accusations against him, he would risk persecution by the authorities on his return or that the authorities would not be able to protect him against harassment by the clans. As to the applicant's relationship with N., the Board referred to the main rule laid down in the Aliens Act, according to which an alien seeking a residence permit in Sweden on account of family ties or a serious relationship must have applied for and been granted such a permit before entering the country. The Board

considered that it would not be unreasonable to require the applicant to file such an application from Libya in accordance with the main rule.

18. On 13 September 2012 the Migration Court (*Migrationsdomstolen*) rejected an appeal lodged by the applicant. It found first of all that the general situation in Libya was not serious enough to justify granting the applicant asylum in the absence of individual reasons. Turning to the applicant's individual reasons, the court found that the applicant's account was not credible, stressing that he had submitted his passport only at the oral hearing before the court, and that it appeared from it that he had been granted a Schengen visa by the Maltese Embassy in Tripoli in May 2010 and that he had entered Sweden on 15 June 2010. Thus, he had deliberately given false statements before the Migration Board concerning his passport, the manner in which he had travelled to Sweden and the date of his arrival. He had also given contradictory statements concerning his knowledge of the possibilities of applying for asylum in Sweden and the alleged threats against him in Libya. Thus, the court did not believe the applicant's asylum story.

19. The court did not question the applicant's homosexuality. However, it considered that he had failed to substantiate his claim that there was a threat against him in Libya on that account. It noted that, according to the applicant's own statements, it was not known in Libya that he was homosexual. The court found it unlikely that, as claimed by the applicant, Libyans in Sweden who knew about his sexual orientation would be more willing to spread this information simply because the applicant was to return to Libya. In sum, it concluded that the applicant had failed to show that he would risk persecution or ill-treatment if he returned to Libya. As far as his relationship with N. was concerned, the court observed that all embassy personnel had an obligation to respect confidentiality and that there were no impediments to the applicant's applying for a residence permit from abroad.

20. One lay judge gave a dissenting opinion and considered that it could not be ruled out that information about the applicant's sexual orientation might leak from an embassy.

21. The applicant made a further appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*), which on 10 October 2012 refused him leave to appeal. The expulsion order against the applicant thereby became enforceable.

22. On 10 December 2012 the Migration Board rejected a request by the applicant for reconsideration of his case. The applicant had submitted, *inter alia*, that a Libyan in Sweden had travelled to Libya and had told the applicant's brother that he was married to another man. The applicant's uncle had later called him and threatened to kill him if he returned to Libya, since he had shamed the family. The Board found no reason to depart from the main rule that an application for family reunion had to be lodged from abroad. The applicant's claim that his relatives had threatened him was not

considered sufficient to constitute a permanent impediment to the enforcement of the expulsion order, and thus there were no grounds to reconsider the applicant's case.

B. Developments subsequent to the Chamber judgment

23. After the Chamber had delivered its judgment on 26 June 2014, the panel of the Grand Chamber granted the applicant's referral request on 17 November 2014 (see paragraphs 7-8 above).

24. In the meantime, on 4 November 2014, the Migration Board's Director General for Legal Affairs issued a Legal Comment concerning the situation in Libya ("*Rättslig kommentar angående situationen i Libyen*"). It noted, *inter alia*, that in May 2014 the Libyan Parliament had elected Ahmed Matiq as Prime Minister, resulting in strong protests and violent fighting between rival groups. In June the Supreme Court had annulled Matiq's election and a few days later he had resigned. Parliamentary elections had followed and in mid-July a coalition had been formed made up of different militia forces with connections to the Muslim Brotherhood and other Islamist groups within the Parliament. This had led to a further escalation of the situation, with militias clashing over control of the airport in Tripoli and intensified fighting in Benghazi. The violence had also spread to residential areas around Tripoli, resulting in many civilian casualties. Tens of thousands of people had been forced to flee from their homes and, according to the United Nations, there were roughly 227,000 internally displaced persons, of whom more than 160,000 had been displaced since the fighting erupted in May 2014. Another 100,000 persons were reported to have fled the fighting to neighbouring countries. The civilian population was also having difficulties moving freely within the country owing to the sporadic roadblocks which had been set up by various militia groups. Moreover, the country's two international airports, Tripoli and Benghazi, had been seriously damaged in the fighting and were partially closed, without any likelihood that they would open for normal business within the foreseeable future.

25. Against this background, the Director General made the following assessment of the security situation in Libya and the possibility of returning to the country:

> "Fighting is ongoing between different actors in several of Libya's coastal cities. The fighting is considered to amount to an armed conflict within the meaning of the Aliens Act. Owing to the political instability, there is currently nothing to indicate that the fighting will stop within the near future. The fighting is serious but not so all-encompassing that every person who returns is at risk of being subjected to violence. An individual assessment must therefore be carried out in each case in accordance with the principles of the *Elgafaji* judgment [*Elgafaji v. Staatssecretaris van Justitie*, C-465/07, Court of Justice of the European Union, 17 February 2009].

> In the other parts of Libya the security situation, owing to the political instability, is considered to amount to serious disturbances of the kind specified in Chapter 4, section 2(a) of the Aliens Act.
>
> The situation for persons returning to Libya is currently difficult. However, the difficulties have arisen only recently and it is still far too early to establish that they amount to a practical impediment to enforcement such as to justify issuing a residence permit.
>
> The Migration Board is continuing to monitor the situation in Libya and the question of impediments to enforcement, and intends to conduct a new assessment within a few months."

26. In the light of the information in the Legal Comment concerning the situation in Libya, and noting that the Court had referred the applicant's case to the Grand Chamber, the Migration Board decided to examine the applicant's case again of its own motion and to determine whether there were impediments to the enforcement of the expulsion order against him.

27. On 17 December 2014 the Migration Board granted the applicant a permanent residence permit in Sweden. It noted first of all that it could not reconsider a decision pronounced by a higher-ranking authority or examine the correctness of the assessments made by such authorities. Since the expulsion order had acquired legal force, the Board could only consider whether the new circumstances in the case amounted to an impediment to the enforcement of the expulsion order. After having referred to the relevant provisions of the Aliens Act and its preparatory works, it made the following assessment of the applicant's case:

> "You are homosexual and come from Libya. You are married to a man with whom you have been living in Sweden since 7 December [2010]. Your sexual orientation and connection to your husband were the subject of examination by the Migration Board and the Migration Court. They can therefore not be considered to be new circumstances within the meaning of the Aliens Act.
>
> On 4 November 2014 the Migration Board's Director General for Legal Affairs issued a new Legal Comment concerning the situation in Libya. From this it appears that fighting is ongoing between different actors in several of Libya's coastal cities, including your hometown, Tripoli. The fighting is considered to amount to an armed conflict within the meaning of the Aliens Act. Owing to the political instability, there is currently nothing to indicate that the fighting will stop within the near future. The fighting is serious but not so all-encompassing that every person returning is at risk of being subjected to violence. An individual assessment must therefore be carried out in each case in accordance with the principles of the *Elgafaji* judgment.
>
> According to the Migration Board's assessment, the deterioration in the security situation in Libya since the Migration Board and the Migration Court examined your grounds for protection, seen against the background of your sexual orientation, is to be regarded as a new circumstance.
>
> Your sexual orientation was not questioned by the Migration Board or the Migration Court and you have, during your years in Sweden, manifested your orientation by, among other things, entering into marriage with a man here. It can therefore be presumed that your intention is to continue to live openly as a homosexual also if you

return to Libya and that you would thereby risk attracting the interest of the Libyan authorities or of individual persons. In the light of the deterioration in the security situation in Libya it is probable, in the Migration Board's assessment, that were you to return you would risk being subjected to persecution on account of your sexual orientation.

Against this background, the Migration Board finds that new circumstances have emerged which amount to an impediment to enforcement for the purposes of Chapter 12, section 18 of the Aliens Act. The Migration Board therefore decides to grant you a permanent residence permit."

THE LAW

I. REQUEST TO STRIKE OUT THE APPLICATION

28. The applicant complained that his return to Libya would entail a violation of Article 3 of the Convention, which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

29. The Government requested the Court to strike the case out of its list of cases, in accordance with Article 37 § 1 of the Convention, on the ground that following the Migration Board's decision of 17 December 2014 the applicant no longer faced a risk of being expelled to Libya. Consequently, in their view, the matter had been resolved at the domestic level and they did not consider that there were any special circumstances regarding respect for human rights which required the continued examination of the application before the Court. In the alternative, the Government contended that the application should be declared inadmissible as the applicant could no longer claim to be a victim within the meaning of Article 34 of the Convention.

30. The applicant stated that he wished to maintain the application and asked the Court to proceed to consider the application on the merits. In his view, the "matter" before the Court had not been resolved, since it encompassed not only the question whether his potential future removal to Libya would violate Article 3. It also concerned the separate question whether the previous decisions by the Swedish authorities had been in breach of Article 3 since, at the time when they had taken their decisions, they knew or ought to have known that his removal to Libya would expose him to a real risk of inhuman or degrading treatment. Moreover, he considered that the domestic authorities' decisions were so flawed as to amount to a procedural violation of Article 3. The "matter" before the Grand Chamber now also included the correctness of the Chamber's

reasoning under Article 3. Furthermore, according to the applicant, respect for human rights required that the Grand Chamber continue the examination of the case, since it raised serious issues of fundamental importance relating to homosexuals' rights and how to assess those rights in asylum cases all over Europe. Lastly, referring to his arguments above, he considered that he was still a victim since the Swedish authorities had at no point acknowledged a violation of his rights under the Convention. While he was grateful for the permanent residence permit, it did not offer full redress, considering the worry, stress and uncertainty caused to him by the domestic authorities' initial decisions.

B. The Court's assessment

31. Article 37 § 1 of the Convention provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

32. The Court observes at the outset that, according to its established case-law in cases concerning the expulsion of an applicant from a respondent State, once the applicant no longer risks being expelled from that State, it considers the case to have been resolved and strikes it out of its list of cases, whether or not the applicant agrees (see, among other authorities, *Paez v. Sweden*, 30 October 1997, *Reports of Judgments and Decisions* 1997-VII; *Sarwari v. Austria* (dec.), no. 21662/10, 3 November 2011; *M.A. v. Sweden* (dec.), no. 28361/12, 19 November 2013; *Isman v. Switzerland* (dec.), no. 23604/11, 21 January 2014; *O.G.O. v. the United Kingdom* (dec.), no. 13950/12, 18 February 2014; and *I.A. v. the Netherlands* (dec.), no. 76660/12, 27 May 2014).

33. The reason for this is that the Court has consistently approached the issue as one of a potential violation of the Convention, being of the view that the threat of a violation is removed by virtue of the decision granting the applicant the right of residence in the respondent State concerned (see *Paez*, cited above, § 29). Following this approach, it has previously found that Article 3 would not be violated since the applicant no longer faced a real and imminent risk of being expelled (see, for instance, *A.G. v. Sweden* (dec.), no. 22107/08, 6 December 2011, and *H v. Norway* (dec.) no. 51666/13, 17 February 2015).

34. As regards the present case, the Court notes that there has been no friendly settlement or agreed arrangement. The granting of a permanent residence permit to the applicant, which effectively repealed the expulsion order, was a measure taken by the Migration Board of its own motion on 17 December 2014, essentially on account of the deterioration in the security situation in Libya since the summer of 2014, as set out in the Migration Board's Director General's Legal Comment on the situation in Libya dated 4 November 2014 (see paragraphs 24-25 above). It is further to be observed that, in so far as his application was declared admissible, the applicant's initial complaint under the Convention was that he feared that his expulsion to Libya would expose him to ill-treatment contrary to Article 3 of the Convention. That threat of a violation was removed by the Migration Board's decision of 17 December 2014 repealing the expulsion order – the enforcement of which had been stayed pending the proceedings – and granting him permanent residence in Sweden.

35. Therefore, in line with its case-law as set out above, the Court finds that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

36. Contrary to what the applicant suggests, in examining this question the Court does not need to enquire retrospectively into whether a real risk engaging the respondent State's responsibility under Article 3 of the Convention existed when the Swedish immigration authorities refused his asylum requests or when the Chamber adopted its judgment. These are historical facts but they do not shed light on the applicant's current situation, in which the impugned risk has been removed; this latter circumstance is decisive for the Court's finding that the matter has been resolved (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008).

37. As to the applicant's submission that there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case (Article 37 § 1 *in fine*), the Court notes that in its decision of 17 December 2014 the Migration Board took the applicant's sexual orientation into account. It found that he was in need of protection in Sweden because the deterioration in the security situation in his home country would put him at risk of being persecuted since he lived openly as a homosexual and could be expected to continue doing so on his return. Against this background, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case.

38. Accordingly, it is appropriate to strike the application out of the list of cases.

II. RULE 39 OF THE RULES OF COURT

39. In view of the above, the application of Rule 39 of the Rules of Court is discontinued.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Decides to strike the application out of its list of cases.

Done in English and in French, and notified in writing on 8 April 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik Fribergh
Registrar

Dean Spielmann
President