



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

Information Note on the Court's case-law 245

November 2020

B and C v. Switzerland - 43987/16 and 889/19

Judgment 17.11.2020 [Section III]

Article 3

Expulsion

Risk of and availability of protection against ill-treatment of a homosexual by non-State actors in Gambia insufficiently assessed: *deportation would constitute a violation*

Facts – The first and second applicants are Gambian and Swiss nationals, respectively. They were in a registered same-sex partnership. The first applicant has been living in Switzerland since 2008. He was refused asylum and, subsequently, a residence permit on grounds of his registered partnership, and was ordered to leave the country. The applicants appealed unsuccessfully. The second applicant died in 2019.

Law – Article 3:

Since the first applicant had not yet been deported, the question of whether he would face a real risk of being subjected to ill-treatment contrary to Article 3 upon his return to the Gambia had to be examined in the light of the present-day situation.

A person's sexual orientation forms a fundamental part of his or her identity and no one may be obliged to conceal his or her sexual orientation in order to avoid persecution (*I.K. v. Switzerland*, [21417/17](#), 19 December 2017). Against this background and irrespective of whether or not the first applicant's sexual orientation was at present known to the Gambian authorities or population, it might subsequently be discovered if he were to be removed there. That had been the case at the time of the domestic authorities' assessment, just as it was now, following the second applicant's death, which might induce the first applicant to find a new partner. The Court disagreed with the domestic authorities' assessment that the first applicant's sexual orientation would presumably not have come to the attention of the Gambian authorities or population.

(a) *Risk of ill-treatment at the hands of the authorities*

Homosexual acts remained criminalised in Gambian legislation and carried severe prison sentences. The Court took the view, consistent with *I.I.N. v. the Netherlands* ([2035/04](#), 9 December 2004) and the case law of the CJEU (*X, Y and Z v Minister voor Immigratie en Asiel*, C-201/12, 7 November 2013), that the mere existence of laws criminalising homosexual acts in the country of destination did not render an individual's removal to that country contrary to Article 3. What was decisive was whether there was a real risk that these laws be applied in practice, which was reported not to be the case in the Gambia at present. Persecution relating to sexual orientation and gender identity by State actors might also take the form of individual acts of "rogue" officers. While no such acts were reported in the recent country reports on the Gambia, it was indicated that this may be due to under-reporting and that LGBTI persons openly expressing their

sexual orientation and/or gender identity were likely to face discrimination from State actors.

(b) *Risk of ill-treatment at the hands of non-state actors*

The domestic authorities had found the first applicant's account in respect of his family not credible in view of his contradictory statements and had concluded that he did not run a risk of ill-treatment at their hands. The Court did not discern any reason to depart from that assessment.

Yet, ill-treatment might also emanate from non-State actors other than family members. Reports indicated widespread homophobia and discrimination against LGBTI persons following years of hatred stirred up by the former President. The third-party interveners had submitted that such dangers had in fact increased following the change of government.

A related question was whether the Gambian authorities would be able and willing to provide the necessary protection to the first applicant against ill-treatment on grounds of his sexual orientation emanating from non-State actors. The availability of such State protection had to be established by the Swiss authorities *proprio motu*. However, the domestic authorities had not engaged in an assessment on the availability of State protection against harm emanating from non-State actors. There were indications that the Gambian authorities had been generally unwilling to provide protection to LGBTI persons and that it would have been unreasonable to expect an LGBTI person to seek protection from the authorities given the continued criminalisation of same-sex sexual acts in the Gambia.

The domestic courts therefore had not sufficiently assessed the risks of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection emanating from non-State actors.

Conclusion: deportation without a fresh assessment of risks would constitute a violation (unanimously).

Article 41: no claim made in respect of damage.

The Court also struck out the second applicant's application in light of his death; and found that it was not necessary to examine the complaint under Article 8.

(See also *F.G. v. Sweden* [GC], 43611/11, 23 March 2016, [Information Note 194](#); [Immigration - Guide on the case-law of the European Convention on Human Rights](#); [Factsheet – Sexual orientation issues](#))