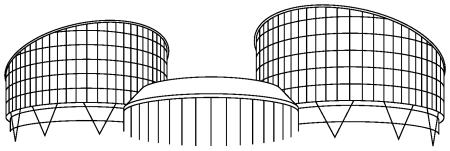

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF M.E. v. SWEDEN

(Application no. 71398/12)

JUDGMENT

STRASBOURG

26 June 2014

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
08/04/2015

This judgment may be subject to editorial revision.

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

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

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges,*
Johan Hirschfeldt, ad hoc *judge,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 20 May 2014, 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 Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr S.-Å. Petersson, a refugee administrator, working in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Ms H. Lindquist, of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that his rights under Articles 3 and 8 of the Convention would be violated if he were expelled to Libya to apply for family reunion from there.

4. On 12 December 2012 the acting President of the Section to which the case had been allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be deported to Libya for the duration of the proceedings before the Court.

5. On the same date, 12 December 2012, the application was communicated to the Government.

6. Mrs Helena Jäderblom, the judge elected in respect of Sweden, was unable to sit in the case (Rule 28 of the Rules of Court). Accordingly, the President of the Chamber decided to appoint Mr Johan Hirschfeldt to sit as an *ad hoc* judge (Rule 29 § 1(b)).

7. In addition to written observations by the applicant and the Government, third-party comments were received from Amnesty International and jointly from the International Federation for Human

Rights (FIDH), the International Commission of Jurists and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), whom the President had authorised to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1982 and is currently in Sweden.

9. On 29 July 2010 he applied for asylum in Sweden, stating that he had entered the country three days earlier. He stated that the smuggler who had organised his journey had taken his passport and he provided a mobile telephone number for a contact person, N.

10. On 6 August 2010, the Migration Board (*Migrationsverket*) held a first interview with the applicant during which he stated that he was from Libya. His mother and siblings remained there and he was in contact with them and would ask them to send him his passport and other identification documents. He further claimed that he had no relatives in Sweden but he provided the mobile telephone numbers of two contact persons in Sweden, N. and H.

11. An in-depth interview was held with the applicant on 20 August 2010, where his public counsel and an interpreter were present. The Migration Board's official informed the applicant of the importance of giving all his reasons for asylum as this might be his only chance to present them. She further assured him that all information provided was treated confidentially. The applicant handed in his identity card and claimed that the authorities had confiscated his passport and other identity documents. He then stated essentially the following.

12. He had left Libya in April 2010 and had travelled to Tunisia, where he had remained until his uncle had helped him to reach 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 he had met some persons who had paid him to transport illegal weapons for powerful clans from southern Libya, 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 interrogated. He had then been taken to an unknown location where he had been kept for about three weeks and 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 where his uncle had visited him and arranged for a lawyer

for him. During the torture, his arm had been seriously injured and become infected and, about two months after his transfer to the military prison, he had been taken to a civil hospital by two guards for treatment. After the doctor had treated him, one of his guards had gone to fetch coffee for him and the other had taken him outside for a cigarette. He had then 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. He showed some scars on his arm, back and head.

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

14. In September 2010, the applicant's public counsel submitted certain clarifications to the Migration Board but essentially maintained what had been stated during the interview.

15. On 21 February 2011 the applicant visited the Migration Board together with N. He stated that he wished to add to his grounds for asylum that he was homosexual and had a relationship with N., whom he had known since his first week in Sweden. Their relationship had developed over time and he had moved in with N. in December 2010. N. was transsexual and had a permanent residence permit in Sweden.

16. In view of this new information, the Migration Board held a supplementary interview with the applicant on 1 November 2011. During this interview, the applicant stated that he had been "normal" before and that it was N. he had become interested in. Their relationship had developed from friendship but it had been difficult because of the very negative attitudes from other Arabs in the city where they lived in Sweden. No one in Libya knew about his sexual orientation and he had never had a homosexual relationship in Libya. N. was in the process of changing gender from man to woman. They had spoken with his mother and sister over internet with a camera but N. had presented himself as a woman. They had married 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. As concerned his original grounds for asylum, and in view of the changes in Libya during 2011, the applicant noted that the situation in Libya was very insecure. He thought that the clans would no longer be particularly interested in him since they had other interests now and were less powerful than before. If he was careful, there would no longer be much of a threat against him in Libya.

18. On 16 December 2011 the Migration Board rejected the application. It first noted that the applicant had failed to submit his passport despite having claimed on several occasions that he had a passport and would

submit it. However, although he had not proved his identity, the Board accepted that he was probably from Libya. As concerned the situation in Libya following the overthrow of Gadhafi, the Board noted that it was serious but did not reach the level of internal armed conflict. Thus, an individual assessment had to be made in the applicant's case. In this respect, the Board found that the applicant had given contradictory statements and that his story lacked credibility. To begin with, he had given diverging information about his passport at the interviews, first claiming that the smuggler had taken it, then that he could obtain it from his family, later that the Libyan authorities had confiscated it and, most recently, that he would submit the passport. It further observed that the name on the certificate relating to impediments to marriage, which the applicant had submitted in support of his marriage, was different from the name that he had given to the Migration Board. Since no passport had been submitted, it was not clear that the certificate concerned the applicant. In the same connection, the Board noted that the applicant had given contradictory statements about when he had met N. and their relationship. At the first interview, on 29 July 2010, he had given N.'s telephone number as a contact number, while in February 2011, he had stated that he had become acquainted with N. during his first week in Sweden and, at the interview in November 2011, he had claimed that he had met N. about three to four months after his arrival in Sweden. Moreover, at the in-depth interview, he had stated that he had no other grounds for his asylum application than those related to the weapon transport and that he had planned to marry in Libya. Against this background, the Board also questioned the nature of the applicant's and N.'s relationship, as relied on before the Board only on 21 February 2011. Thus, the Board concluded that the applicant's story, both in relation to events in Libya and his relationship with N., lacked credibility and was not sufficient to justify granting him a residence permit in Sweden.

19. Furthermore, the Board noted that substantive changes had occurred in Libya after the applicant had left the country and considered that he had failed to substantiate that, on the basis of the criminal accusations against him, he would risk persecution by the authorities upon return or that the authorities would not be able to protect him against harassment by the clans. As concerned the applicant's relationship to N., the Board referred to the main rule in the Aliens Act that an alien, who seeks 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. Whilst noting that an exemption from this rule can be made if the alien has strong ties to a person who is resident in Sweden and it cannot reasonably be required that he or she travel to another country to submit an application there, 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. As there were no other grounds on which to grant the applicant leave to remain in Sweden, his application was rejected.

20. The applicant appealed to the Migration Court (*Migrationsdomstolen*), maintaining his claims and adding that the spelling of his name differed in the various documents because the transcriptions from Arabic had been made by different persons. He had his passport but had been afraid to hand it over to the Migration Board for fear of being returned to Libya. His relationship with N. was serious; they were married and lived together. It would also become known in Libya that he was homosexual if he were to apply for a residence permit from there, which would expose him to a real risk of persecution and ill-treatment. Moreover, he would not be able to apply for a residence permit from Libya since Sweden had a consulate only in Benghazi. He submitted a copy of his passport, from which it appeared 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. He also submitted a copy of a military card, copies of photographs of scars and two warrants for his arrest.

21. During the oral hearing before the Migration Court, the applicant claimed that there was a threat against him from the Libyan authorities since he had worked for the military during the Gadhafi regime. Moreover, he added that it was not known in Libya that he was married to a man but he was certain that other Libyans in Sweden would spread that information to Libya, if he were to be sent there. In his view, it would also become known that he was homosexual if he had to apply for family reunion and be interviewed at the Swedish Consulate in Libya. He also presented his passport in original.

22. On 13 September 2012 the Migration Court rejected the appeal. It first found that the general situation in Libya was not severe enough to grant the applicant asylum without there being individual reasons for asylum. Turning to the applicant's individual reasons, the court noted that, since he had now submitted his passport, certain other documents provided could be linked to him. However, on examining these documents, the court found that the military card was for training and did not show that the applicant had later been employed by the military. The two warrants for arrest were of a simple character and easy to fabricate. Moreover, one of them did not contain any date and the applicant had not given any acceptable explanation of how he had obtained them. Turning to the photographs of the scars, the court considered that the fact that the applicant had had wounds which had left scars did not make probable that he would be ill-treated in the future. Thus, the court concluded that the documents did not show that the applicant was in need of international protection. Furthermore, the court found that the applicant was not credible, stressing that he had submitted his passport only at the oral hearing before the court and that he had deliberately given false statements before the Migration Board concerning

his passport, how 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.

23. However, the court did not question that the applicant was homosexual but considered that he had failed to substantiate that there was a threat against him in Libya on account of this. In this connection, the court noted that, according to the applicant's own statements, it was not known in Libya that he was homosexual. Moreover, it took the view that it was unlikely that Libyans in Sweden who knew about the applicant's sexual orientation would be more willing to spread this information simply because the applicant was to return to Libya. The court also noted that the applicant had kept his passport in order to be able to return to Libya. In sum, it concluded that the applicant had failed to show that he would risk persecution or ill-treatment upon return to Libya. In so far as concerned his relationship with N., the court observed that all embassy personnel had an obligation to respect confidentiality and that there were no impediments for the applicant to apply for a residence permit from abroad. The fact that the Swedish Consulate was located in Benghazi did not alter this conclusion.

24. 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.

25. The applicant made a further appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*) which, on 10 October 2012, refused leave to appeal.

26. The applicant then requested the Migration Board to reconsider his case, submitting that a Libyan in Sweden, who knew about his marriage, had travelled to Libya and, by chance, had met his brother and told him that he was married to another man. His uncle had later called him and threatened to kill him if he returned to Libya since he had shamed the family. He further claimed that friends of his in Libya had told him that 12 homosexuals had been killed in Libya recently and that others had fled the country since they were being persecuted by unknown groups in Libya. He was convinced that he would face a real risk of being ill-treated or killed if returned and that it would not be possible for him to apply for family reunion from there without his sexual orientation becoming known.

27. On 10 December 2012 the Migration Board rejected the request for reconsideration. It found that there was 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 was no ground to reconsider the applicant's case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Aliens Act – Need for International Protection

28. The basic provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716). It defines the conditions under which an alien can be deported or expelled from the country, as well as the procedures relating to the enforcement of such decisions.

29. Chapter 5, section 1, of the Aliens Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, section 1, of the 2005 Act, the term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2, of the Aliens Act).

30. Moreover, if a residence permit cannot be granted on the above grounds, a permit may nevertheless be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) as to allow him or her to remain in Sweden (Chapter 5, section 6, of the Aliens Act). During this assessment, special consideration should be given to, *inter alia*, the alien's state of health.

31. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 12, section 1, of the Aliens Act). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2, of the Aliens Act).

B. The Aliens Act – Family Reunion

32. Under Chapter 5, section 3, paragraph 1, point 1, of the Aliens Act, a residence permit shall, unless otherwise provided in sections 17 and 17b, be granted to an alien who is a spouse or cohabiting partner of someone who is resident or has been granted a residence permit to settle in Sweden.

33. By virtue of Chapter 5, section 18, of the Act, an alien who wants a residence permit in Sweden on account of family ties or serious relationships must have applied for and been granted such a permit before entering the country. An application for a residence permit may not, as a general rule, be approved after entry. However, exemptions from this rule can be made, for example if the alien has strong ties to a person who is resident in Sweden and it cannot reasonably be required that he or she travel to another country to submit an application there (Chapter 5, section 18, second paragraph, point 5). As regards this exemption, the preparatory works to the provision (Government Bill 1999/2000:43, p. 55 et seq.) state that the main emphasis should be placed on the question of whether it is reasonable to require that the alien return to another country in order to submit an application there. Relevant elements, which may be favourable for the alien, may be whether he or she can be expected, after returning home, to encounter difficulties in obtaining a passport or exit permit and this is due to some form of harassment on the part of the authorities in the country of origin. It may also be whether the alien will be required to complete a long period of national service or service under unusually severe conditions. It may also be relevant whether the alien has to return to a country where there is no Swedish foreign representation and where major practical difficulties and considerable costs are associated with travelling to a neighbouring country to submit the application there. Relevant elements, which may count against the alien, may be that he or she is staying in the country illegally, that their identity is unclear or if there are strong ties to the country of origin. An exemption may also be made if there are some other exceptional grounds (Chapter 5, section 18, second paragraph, point 10).

34. The requirement that, in principle, residence permits for family members have to be granted before entry into Sweden was introduced as one of a number of measures aimed at reducing the possibilities of obtaining a residence permit by means of marriages or relationships of convenience. Subsequently, the Swedish Government and Parliament have underlined on several occasions that the requirement that residence permits be obtained before entry into Sweden is an important part of measures to maintain regulated immigration. Moreover, the preparatory works to the Aliens Act state that it is important that aliens staying in Sweden illegally do not enjoy a better position than those who comply with decisions by the authorities to return to their country of origin in order to apply for a permit from there (Government Bill 1999/2000:43).

35. The Migration Board recommends that all persons who wish to apply for a residence permit in Sweden on the basis of close relationships do so online, since that procedure is faster and simpler. It is also possible to apply for priority treatment at the time of submitting the application for a residence permit.

C. Legal Position by the Head of the Legal Department of the Migration Board relating to protection on the basis of sexual orientation

36. On 13 January 2011 the Head of the Legal Department of the Migration Board issued a 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*). This method reflects the test established by the United Kingdom Supreme Court in its judgment of 7 July 2010 in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31 (§ 82), namely:

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention [United Nations Convention relating to the Status of Refugees 1951] does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow

> if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention [United Nations Convention relating to the Status of Refugees 1951] exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

37. The Head of the Legal Department concluded that the above test would be sufficient when considering the future risk of persecution both during the actual asylum examination and when considering whether there are impediments to the enforcement of an expulsion order.

D. Swedish Representations in Northern Africa

38. According to the official Swedish Government site (www.swedenabroad.com), Sweden only has one representation in Libya which is the Consulate in Benghazi, but this is closed until further notice due to the volatile situation in the country. However, Sweden has embassies in Algiers, Algeria, and in Cairo, Egypt, as well as a consulate in Tunis, Tunisia, which are all open and deal with requests for residence permits in Sweden.

E. The Swedish Public Access to Information and Secrecy Act

39. According to Chapter 21, section 5, of the Public Access to Information and Secrecy Act (*Offentlighets- och sekretesslag*, 2009:400, hereafter "the Secrecy Act"), secrecy shall apply to information regarding an alien if it can be assumed that any person would be subjected to an attack or would otherwise be seriously harmed on account of the relationship between the alien and a foreign state or foreign authority, or an organisation of foreigners, should the information be disclosed.

40. Moreover, Chapter 37, section 1, of the Secrecy Act stipulates that secrecy shall apply, in any activity for control of aliens and in any matter concerning Swedish citizenship, to information regarding an individual's personal circumstances, unless it is evident that the information can be disclosed without the person concerned or any other person closely related to him or her being harmed. The Migration Board and the migration courts' handling of cases concerning an alien's right to asylum or residence permit in Sweden falls within the term "activity for control of aliens" in the Secrecy Act. It has also been clarified in the preparatory works to the Act (Government Bill 2003/04:93, pp. 84-85) that any assistance from the Swedish Embassies or Consulates abroad in the handling of cases

concerning aliens' right to asylum or residence permits in Sweden may not put any individual at risk or cause him or her any harm, for example in the form of harassment from a foreign state's authorities.

III. RELEVANT INFORMATION ON LIBYA

A. General country information

41. The security situation in Libya remains volatile. In a Presidential Statement, dated 16 December 2013, the United Nations Security Council expressed grave concern at the worsening security situation and political division in Libya, which threatened to undermine the transition to democracy. The Security Council strongly condemned the killing of unarmed protestors in Tripoli on 15 November 2013 and emphasised that all parties had to reject violence against civilians. It further called for urgent progress towards an inclusive national approach to disarmament, demobilisation and reintegration into civilian life or integration into State military or security institutions. The Security Council also supported the efforts of the Libyan State forces to restore public security and counter violence by extremist groups. Moreover, it condemned cases of torture and mistreatment, and deaths by torture, in illegal detention centres in Libya. It emphasised that practices of torture and extrajudicial killing should not be tolerated and expressed its grave concern about the continued arbitrary detention, without access to due process, of thousands of persons held outside the authority of the State and reiterated its calls for their immediate release or transfer to detention centres under State authority. In this regard, the Security Council welcomed the recent transitional justice law promulgated by Libya's General National Congress and encouraged its full implementation. Expressing its concern about all human rights violations and abuses, the Security Council called upon the Libyan authorities to investigate and bring to justice the perpetrators of all such acts, including those committed against children.

42. Libyan nationals need a visa to enter Egypt but this can be obtained upon arrival in the country. Moreover, a visa is not required for Libyan nationals to travel to Algeria or Tunisia, as long as the stay does not exceed three months.

B. The situation in Libya for homosexuals

43. All sex acts outside marriage are prohibited by the Libyan Penal Code, Articles 407 and 408, and punishable by a term of imprisonment of five years at most. Same-sex marriage or partnership is not legalised in Libya, making all homosexual acts illegal. It appears unclear, however, to

what extent homosexual acts are prosecuted and punished as they can be difficult to prove. In an interview by the online newspaper Pink News, "Interview: Gays and the Libyan Revolution, before and after (part 1)", published on 8 February 2012, a Libyan gay activist stated that he had never heard of publicly documented cases of men being charged under the Penal Code. Still, according to several sources (see, among others, the 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, with further references, and Asylum Research Consultancy, commissioned by the UNHCR, "Libya Country report, dated 5 July 2013, Chapter 4.9), homosexuality is a taboo subject not only in public spaces but also within the private sphere, seen as an immoral activity against Islam and socially stigmatised.

44. On 13 February 2012, UN Watch ("Libya tells UN Rights Council: 'Gays threaten continuation of human race'") reported that a United Nations delegate from Libya's newly formed government had said during that day's session of the UN Human Rights Council, while discussing violence based on sexual orientation, that "lesbian, gay, bisexual and transgender, or LGBT, topics affect religion and the continuation and reproduction of the human race." It noted that the comment had made human rights activists question whether the new government would be more tolerant than its predecessor, under which homosexuals were subject to floggings and imprisonment.

45. The United Kingdom Border and Immigration Agency, "Country of Origin Information Report on Libya", dated 19 December 2012 (paragraphs 20.12 and 20.13, with further references), noted that during 2012 the Nawasi Brigade, Tripoli's largest and most powerful militia brigade, allegedly arrested, assaulted and beat homosexuals simply for being homosexual. According to the report, one incident took place in November 2012 when the brigade arrested and detained 12 allegedly gay men who were at a private party, releasing them one week later with bruises on their backs and legs and shaved heads. It was also observed that the brigade officially works under the authority of the Ministry of Interior.

IV. OTHER RELEVANT INFORMATION

A. United Nations High Commissioner for Refugees (UNHCR)

46. On 23 October 2012 the UNHCR issued its "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". It starts from the premise that everyone is entitled to live in society as who they are and need not hide that (paragraph 12 of the

Guidelines). Moreover, what amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant (paragraph 16). Discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned. Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be undertaken by reference to reliable, relevant and up-to-date country of origin information (paragraph 17).

47. The UNHCR further states that it is well established that laws which criminalise consensual same-sex relations are discriminatory and violate international human rights norms (paragraph 26). Even if irregularly, rarely or never enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGBTI (lesbian, gay, bisexual, transgender and intersex) person, rising to the level of persecution. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can also promote political rhetoric that can expose LGBTI individuals to risks of persecutory harm. These laws can also hinder LGBTI persons from seeking and obtaining State protection (paragraph 27). The UNCHR also notes that where the country of origin information does not establish whether or not, or to what extent, the laws are actually enforced, a pervading and generalised climate of homophobia in the country of origin could be evidence that LGBTI persons are nevertheless being persecuted (paragraph 28).

48. Furthermore, the UNCHR observes that even where consensual same-sex relations are not criminalised by specific provisions, laws of general application, for example, public morality or public order laws (such as loitering) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution (paragraph 29).

49. The UNCHR also stresses that the fact that an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status (paragraph 31). Moreover, it underlines that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct since there is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion (paragraph 32).

B. The Court of Justice of the European Union

50. In a judgment of 7 November 2013 (joined cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v. X, Y and Z*) the Court of Justice of the European Union ruled that:

> "1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.
>
> 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.
>
> 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexuality."

C. Criminal legislation in Algeria, Egypt and Tunisia

51. The Algerian Penal Code (Ordinance 66-156 of June 8, 1966) Article 338 states:

> "Any person guilty of a homosexual act shall be punished with a term of imprisonment of between 2 months and two years, and with a fine of between 500 to 2,000 Algerian Dinars".

52. The Tunisian Penal Code of 1913 (as modified), Article 230, states in an unofficial translation:

> "Sodomy, which is not covered by any of the other previous articles, is punished with imprisonment for three years".

53. In Egypt, sexual relations between consenting adults of the same sex in private are not prohibited as such. However, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association, "State Sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love" (8th edition, May 2013), the Law on the Combating of Prostitution, and several articles of the Penal Code, have been applied to imprison gay men in recent years. For instance, the Penal Code, Article 278 states:

"Whoever commits in public a scandalous act against shame shall be punished with detention for a period not exceeding one year or a fine not exceeding three hundred pounds."

Moreover, Law 10/1961 on the Combating of Prostitution, Article 9, states:

"Punishment by imprisonment for a period of not less than three months and not exceeding three years and a fine not less than 25 LE and not exceeding 300 LE [...] or one of these two punishments applies in the following cases:

(a) Whoever lets or offers in whatever fashion a residence or place run for the purpose of debauchery or prostitution, or for the purpose of housing one or more persons, if they are to his knowledge practising debauchery or prostitution.

(b) Whoever owns or manages a furnished residence or furnished rooms or premises open to the public and who facilitates the practice of debauchery or prostitution, either by admitting persons so engaged or by allowing on his premises incitement to debauchery or prostitution.

(c) Whoever habitually engages in debauchery or prostitution. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

54. The applicant complained that, if he were forced to return to Libya to apply for family reunion from there, he would face a real risk of being persecuted and ill-treated primarily because he is homosexual but also due to previous problems with the authorities. He relied on Article 3 of the Convention, which reads as follows:

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

A. Admissibility

55. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

56. The applicant maintained that the implementation of the Swedish authorities' decision to expel him to Libya would violate Article 3.

57. Primarily, he relied on his homosexuality and claimed that he had friends in Libya, both homosexual and transsexual, and that they had had to be very careful since it was considered to be against Islam and Libyan culture to be homo- or transsexual. They had been persecuted and he had been arrested twice by the morality police. He and his friends had been beaten and robbed by people there. Moreover, he had met N. shortly after arriving in Sweden and they were now married. N. was transsexual and was undergoing treatment to become a woman. The applicant alleged that he had lived openly as homosexual in Sweden and that his sexual orientation and marriage to N. had become known to his family in Libya and that they had threatened to kill him because of that. He further claimed that his sexual orientation would in any event become known in Libya if he were to apply for a Swedish residence permit from there on the basis of his marriage. He did not believe that information would not be leaked from the Swedish Embassy and he would also have to contact Libyan authorities. Since homosexual acts were criminalised in Libya, he would be killed or severely punished.

58. The applicant further maintained that he had been working for the military in Libya and had been arrested by the military authorities for smuggling illegal weapons in his car. He had not known about the weapons but he had been beaten and tortured in order to extract a confession from him. He had then been sent to a hospital from where he had managed to escape. With the help of his uncle and by paying bribes, he had obtained a visa to flee from Libya. Thus, for this reason also he would be at risk of ill-treatment and arrest if returned to Libya.

59. Lastly, the applicant stated that he agreed with the submissions of the third-party interveners and was convinced that he would be persecuted and ill-treated, contrary to Article 3 of the Convention, if forced to return to his home country.

(b) The Government

60. The Government contended that the applicant's expulsion to Libya, for a limited time, would not be in violation of Article 3 of the Convention.

61. While they did not wish to underestimate the concerns that could legitimately be expressed with respect to the current security and human rights situation in Libya, including for LGBT persons, they considered that the situation was not such that there was a general need to protect all asylum

seekers from the area. An individual assessment of the applicant's situation had to be made.

62. In the Government's view, effective guarantees existed under the Aliens Act which protected the applicant against arbitrary *refoulement*, directly or indirectly, to his home country and had been applied by the Migration Board and the migration courts as they had made a thorough examination of the applicant's case. The Government noted that the Migration Board had held several interviews with the applicant and the Migration Court had held an oral hearing. Moreover, the applicant had been represented by public counsel throughout the proceedings. Therefore, significant weight had to be given to the findings of the Swedish migration authorities, which were specialised bodies with particular expertise in this domain.

63. As concerned the applicant specifically, the Government observed that he had altered, as well as escalated, his asylum account during the domestic proceedings. They entirely concurred with the reasoning of the Migration Board and Migration Court as concerned the applicant's claims about involvement in illegal weapons transport and found these claims to be unsubstantiated.

64. Turning to the applicant's sexual orientation, the Government noted that he had only told the Migration Board that he was homosexual in February 2011 and he had then escalated and altered his account on this point both before the Swedish authorities and before the Court. Here, they stressed that his claims before the Court that he had had homosexual and transsexual friends already in Libya and that they had been beaten and arrested by the morality police, was completely new information that he had never mentioned during the national proceedings and which, consequently, had never been examined in Sweden. On the contrary, he had submitted to the Swedish authorities that it was not known in Libya that he was homosexual, that he had not had any homosexual relationships in his home country and that he had been attracted to women before meeting N. Having regard also to the fact that the applicant had lied about his passport and how and when he had travelled to Sweden, the Government contended that there were strong reasons to question his credibility, including the veracity of his late submissions.

65. The Government further stated that, although the Swedish Consulate in Benghazi was currently closed, the applicant could apply for a residence permit from the Swedish Embassy in either Cairo or Algiers. Moreover, if he made his application through the online application system offered by the Migration Board, all documents would be handled electronically and he would only have to go to a Swedish embassy for the interview. By making the application online, the applicant would also shorten the waiting time from 7 to 9 months to approximately 4 months. It was the Swedish Embassy that checked the documents, made a report and took photographs and

fingerprints before the details were sent to the Migration Board for further processing and decision-making. Here, the Government underlined that Swedish embassy and consulate staff were bound by the provisions of the Secrecy Act and thus obliged not to disclose publicly any information about the applicant's sexual orientation. Thus, while acknowledging the worrying human rights situation for homosexuals in Libya and neighbouring Arab countries, as well as the stigmatisation surrounding issues relating to same-sex relations, they argued that there was nothing to suggest that information about the applicant's sexual orientation or his marriage would be spread publicly during the short time that he might spend in Libya or a neighbouring country.

66. In this respect, the Government pointed out that the preparatory works to the Aliens Act (Government Bill 2005/06:6, pp. 26-27) emphasised that it must never be required of an applicant that he or she waive a fundamental characteristic such as sexual orientation on return to his or her country of origin. They also referred to the Legal Position by the Head of the Legal Department of the Migration Board relating to protection on the basis of sexual orientation (see above paragraphs 36-37). They again stressed that an assessment had been made in the applicant's case of the risk of persecution or whether there were any other grounds that made it unreasonable for the applicant to return to Libya and await a decision regarding a residence permit there, and that it had been concluded that there was no real and personal risk to the applicant.

67. In view of the above, the Government maintained that there would be no violation of Article 3 of the Convention if the applicant were expelled to his home country to apply for a residence permit on the basis of his marriage to N. from there.

(c) The third-party interveners

68. Amnesty International 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. In this respect, Amnesty International stressed that achieving substantive equality might require that the State treat differently situated individuals differently in order to guarantee equality of result. Thus, it would be unreasonable to demand that a homosexual applicant travel to, and remain for months in, a country where same-sex sexual conduct was vilified or even illegal, since this would mean that the applicant would have to hide a core aspect of his or her identity, and run a significant risk if the same-sex marriage became generally known. In these situations, affirmative action of the State parties might be required. Ultimately, Amnesty International contended that coercing any individual to renounce their identity – including fundamental components thereof – constituted in and of

itself a gross violation of human rights, including under Articles 3, 8, 10, 11, 12, 13 and 14 of the Convention.

69. The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the International Federation for Human Rights (FIDH) and the International Commission of Jurists (ICJ) made a joint third-party submission. They noted that there now existed in the majority of Council of Europe Member States social, cultural and legal recognition of the right of gay and lesbian individuals to "live freely and openly". In this respect, they referred, *inter alia*, to the case of *Alekseyev v. Russia* (nos. 4916/07, 25924/08 and 14599/09, § 84, 21 October 2010) as well as to the UNHCR 2012 Guidelines on International Protection No. 9 (see above paragraphs 45-48) and the United Kingdom Supreme Court judgment in *HJ [Iran] and HT [Cameroon]* from 2010 (see above paragraph 36). With reference to the test set out in the *HJ [Iran]* judgment, they noted that the Italian Supreme Court had gone even further by finding that the sanction of criminal law against homosexual acts provided by Article 319 of the criminal code of Senegal was in itself a general condition of deprivation of the fundamental right to live an emotional and sexual life without restrictions. As a consequence, the criminalisation of homosexual acts by this provision was considered to be in itself a form of persecution (*Ordinanza n. 15981 del 2012*, Corte Suprema di Cassazione, 20 September 2012).

70. ILGA-Europe, FIDH and ICJ thus 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.

2. The Court's assessment

(a) General principles

71. The Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, *inter alia*, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102 Series A no. 215, p. 34). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the

Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 of the Convention implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).

72. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

73. The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, *inter alia*, *N. v. Sweden*, no. 23505/09, § 53, 20 July 2010 and *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007). In principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *NA. v. the United Kingdom*, no. 25904/07, § 111, 17 July 2008).

74. As regards the general situation in a particular country, the Court has held on several occasions that it can attach a certain importance to information contained in recent reports from independent international human rights protection associations or governmental sources. At the same time, the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see, for example, *Saadi*, cited above, § 131, with further references).

75. Thus, in order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of the removal of the applicant to Libya, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108).

(b) The applicant's case

76. From the outset, 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.

77. The matter to be considered by the Court is whether it would be in breach of Article 3 of the Convention if the Swedish authorities were to implement the order to return the applicant to Libya to apply for family reunion from there.

78. 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 (see, *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010). In this respect, the Court observes that the applicant's case was examined on the merits by the Migration Board, which held two in-depth interviews with the applicant, and by the Migration Court, which held an oral hearing. Moreover, the Migration Court of Appeal considered his appeal but found no grounds on which to grant leave to appeal. Furthermore, the applicant then requested the Migration Board to reconsider his case on the basis of new information but this request was rejected by the Board. The Court notes that the applicant was represented throughout the proceedings by legal counsel who filed a number of submissions on his behalf.

79. The Court will first consider the applicant's claim that he risks being arrested and ill-treated because he was involved in illegal weapons transport in Libya before leaving the country.

80. In this respect, the Court observes that the Government have questioned the applicant's credibility, as did the national authorities in Sweden, which found that he had given them contradictory and deliberately false information. Thus, he had given several accounts of how and when he had travelled to Sweden and the whereabouts of his passport. Moreover, the Court notes that in November 2011 the applicant stated that following the fall of Gadhafi, the threat against him in Libya had decreased. However, during the oral hearing before the Migration Court, he claimed that there was a threat against him in Libya because he had worked in the military during the Gadhafi regime. In his submissions to the Court, the applicant has reverted to his original claim that there is still a threat against him due to the weapons transport but he has not elaborated further. Here, the Court also notes that, during the domestic proceedings, the applicant had said that he had transported weapons for the clans for more than a year, whereas before the Court, he has claimed that he had not known about the weapons in the car when he was stopped.

81. In view of the above and of the thorough examination of the applicant's claims in this regard by the domestic authorities, the Court cannot but join them and the Government in finding that the applicant lacks credibility and, consequently, that he has failed to substantiate that he would face a real and personal risk of arrest or ill-treatment upon return to Libya on the basis of his alleged involvement in illegal weapons transport before leaving the country. In reaching this conclusion, the Court has also had regard to the change in power in Libya since the applicant left the country.

82. Next, the Court will consider the applicant's claim that he would face a real and personal risk of being persecuted and ill-treated if returned to Libya, even for a short period of time, due to his sexual orientation and the fact that he is married to N.

83. The Court first notes that neither the migration courts nor the Government have questioned that the applicant is homosexual and that his marriage to N. is serious. It will thus proceed on this basis.

84. With reference to paragraph 80 above, the Court reiterates that the national authorities found that the applicant lacked credibility since he altered and escalated his story during the proceedings. The Government have also highlighted the changes that the applicant has made to his account during the domestic proceedings as well as before the Court. 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. In particular, it seems strange that in his first submission to the Court, in December 2012, the applicant claimed that he had already lived as a homosexual in Libya before going to Sweden and had suffered beatings and two arrests by the morality police. He has never brought these claims before the Swedish authorities even though he requested the Migration Board to reconsider his case in October 2012, only a few months before raising them before the Court. On the contrary, during the in-depth interview with the Migration Board on 20 August 2010, the applicant had stated that he had lived well in Libya until his arrest and that he had planned to marry a woman in Libya in May 2010 (see above paragraph 13). 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.

85. The Court should also examine if the Migration Board and the Migration Court expressly applied the recommended test set out in the Legal Position by the Head of the Legal Department of the Migration Board since it had been issued in January 2011, before the Migration Board's decision of 16 December 2011 and the Migration Court's judgment of 13 September 2012. In relation to the Migration Board, the Court notes that it did not apply the test since it did not find it substantiated that the applicant was actually homosexual and involved with N. Thus, there was no need to carry out the test at all. In so far as concerns the Migration Court, the Court

observes that it did not question the applicant's sexual orientation but found that he had not substantiated that there was a threat against him in Libya. Consequently, it did not proceed to consider the remaining criteria.

86. In any event, the Court observes that the applicant has stated that he introduced N. to his family when they spoke over internet with a camera and that N. presented himself as a woman. The applicant's family is thus aware of his relationship and marriage to N. but believes N. to be a woman since the applicant has chosen to present the relationship in this manner. In the Court's opinion, this indicates that the applicant has made an active choice to live discreetly and not reveal his sexual orientation to his family in Libya – not because of fear of persecution but rather due to private considerations (compare criteria 6 of the test set out in the Legal Position, above paragraph 36).

87. Moreover, 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 Articles 407 and 408 of 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. Thus, while having regard to the fact that homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya, the Court does not have sufficient foundation to conclude that the Libyan authorities actively persecute homosexuals.

88. Furthermore, the Court notes that the applicant has a passport and thus would not have to contact Libyan authorities for this purpose. Moreover, it 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 supress 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.

89. 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.

90. Having regard to all of the above, 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. Accordingly, the implementation of the expulsion order against the applicant would not give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

91. The applicant also complained that if he were expelled to Libya to apply for family reunion from there, it would amount to a violation of his right to family life since he would be separated from N. in Sweden. He relied on Article 8 of the Convention which, in relevant parts, reads:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

92. The Government contested that argument.

93. The Court stresses that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38, and *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see, among others, *Rodrigues*

da Silva and Hoogkamer, cited above, ibid., and *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000).

94. Turning to the present case, the Court reiterates that what is at issue 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. What the Court has to consider is whether it would violate Article 8 of the Convention if the Swedish authorities implemented the order that the applicant return to Libya to apply for family reunion from there.

95. In this respect, the Court considers that the applicant's relationship with N. amounts to family life within the meaning of Article 8 § 1 of the Convention, noting that they have lived together since December 2010 and were married in September 2011. It further finds that the impugned decision to remove the applicant from Sweden interfered with his and N.'s right to respect for their family life.

96. As to the further question of whether the interference was justified under Article 8 § 2, the Court is satisfied that the decision to expel the applicant was in accordance with Swedish law and pursued a legitimate aim, notably the economic well-being of the country and the effective implementation of immigration control. It remains for the Court to examine whether the expulsion order was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

97. In this assessment, the Court observes that an important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where this is the case, the removal of the non-national family member would be incompatible with Article 8 only in exceptional cases (see *Nunez v. Norway*, no. 55597/09, § 70, 28 June 2011).

98. On this issue, the Court notes that the applicant has at no time been granted lawful residence in Sweden. Moreover, he and N. met and formed their relationship while the applicant's application for asylum was pending and thus they knew that the applicant might not be granted leave to remain in Sweden and, consequently, that the future of their family life in Sweden was uncertain.

99. Moreover, as the Court has concluded above (see above paragraph 90), it has not been substantiated that the applicant would be at risk of treatment contrary to Article 3 if he had to return temporarily to Libya to submit his application for family reunion from there.

100. Thus, at this stage, the Court finds that there is nothing to suggest that the separation of the applicant and N., two adults, would be other than temporary or that the process of examining the application for family reunion would be unduly lengthy. Furthermore, the applicant has the possibility to submit his application electronically and request priority,

which would speed up the process. In addition, although N. cannot be expected to accompany the applicant to Libya due to his personal situation, it has not emerged that they would lack the possibility to be in contact via, *inter alia*, telephone or internet during the period in question, noting that the applicant stated before the domestic authorities that they had contact with his family in Libya by these means (see above paragraph 16).

101. In these circumstances, the Court finds that the Swedish authorities have not failed to strike a fair balance between the applicant's interests on the one hand and the State's interest in effective implementation of immigration control on the other or that the assessments made appear at variance with Article 8 of the Convention.

102. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 a) and 4 of the Convention.

III. RULE 39 OF THE RULES OF COURT

103. The Court points out that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

104. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above paragraph 4) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one that the expulsion of the applicant to Libya would not give rise to a violation of Article 3 of the Convention;

3. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 26 June 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Judge De Gaetano;

(b) dissenting opinion of Judge Power-Forde.

M.V.
C.W.

SEPARATE OPINION OF JUDGE DE GAETANO

1. Although I voted with the majority in this case, I do not share entirely the reasons advanced in the judgment. Indeed, I would have been more inclined to dismiss the application as manifestly ill-founded in terms of Article 35(3)(a), as the Government had proposed in their memorial of 7 February 2013 (see paragraph 16 of that memorial).

2. In the instant case there is not only a huge deficit in terms of the applicant's credibility, but also a manifest absence of evidence to suggest that the applicant, if returned to Libya, would face a specific, personal and significant risk of ill-treatment amounting to inhuman or degrading treatment whether because of his alleged "gun-running" or because of his alleged sexual orientation. Unfortunately the whole case was side-tracked, both before the domestic tribunals and before the Court, over issues connected with the requirement that the request for family reunification must, as a rule, be made before entering Sweden (see paragraph 33 and 34 of the judgment).

3. The Court's judgment is in large measure predicated on the fact that "neither the migration courts nor the Government have questioned that the applicant is homosexual and that his marriage to N. is serious" (paragraph 83). That statement is, to my mind, not entirely correct. The Migration Board did have doubts as to the applicant's story "both in relation to events in Libya and his relationship with N." (see paragraph 18 *in fine*). The fact of whether the applicant's 'marriage' to N. was genuine or merely one of convenience did not, in reality, have to be decided by the domestic tribunals at that stage of the proceedings – that fact would have become pertinent at the stage of the application for family re-unification. Secondly, not questioning a fact does not necessarily mean that one accepts that fact as being correct. In their memorial, abovementioned, the Government (in paragraph 2) stated that "The Statement of Facts...prepared by the Registry of the Court appears to be essentially correct." That Statement of Facts reproduces essentially the decisions of the domestic tribunals, and the fact that the Government agree *as to what those tribunals actually said* does not mean that the Government agree that what was said was correct. In any event, it appears from that Statement of Facts that it was only the Migration Court (as opposed to the Migration Board) which "did not question the applicant's claim that he was homosexual". There is nothing in that Statement of Facts as to the seriousness or otherwise of the 'marriage'. The domestic tribunals had not reached that bridge and were therefore not required to cross it. Finally, in the said memorial the Government do cast doubt on the general credibility of the applicant and the veracity of his story: "In view of the above, and with regard to the fact that many of the

inconsistencies referred to touch upon essential aspects of the applicant's asylum account, the Government contends, like the domestic migration authorities, that there are strong reasons to question his credibility." (paragraph 37 of the memorial).

4. The reference to the judgement of the ECJ in the names *Minister voor Immigratie en Asiel v. X, Y and Z* in paragraph 50 is totally unnecessary for the determination of the present case. The controversial statement (admittedly made in the specific context of Council Directive 2004/83/EC) to 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 set by the Court as far back as the 1980's in connection with the criminalisation of homosexual acts and the resulting violation of Article 8 (see *Dudgeon v. the United Kingdom* no. 7525/76, 22 October 1981, §§ 40 to 46; *Norris v. Ireland* no. 10581/83, 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.

DISSENTING OPINION OF JUDGE POWER-FORDE

In this case, the starting point for the Court's analysis must be that the applicant is a gay man whose relationship with N. is recognised as a lawful marriage under Swedish law.[1] Homosexuality is illegal in Libya—the applicant's country of origin—and is punishable by imprisonment. Whilst, apparently, there have been no 'active prosecutions' since the fall of the former regime, recent evidence indicates that arrests and serious assaults are inflicted upon homosexuals 'simply for being homosexual' (§ 45 of the judgment).

The Court is required to consider whether the respondent State may expel, even temporarily, a person whose sexual orientation would expose the individual concerned to a real risk of treatment that violates Article 3 in his or her country of origin if that person were to be open about his or her sexual orientation.

Ten years ago the Court adopted two decisions relating to gay men from Iran and declared their applications inadmissible. In *F. v. the United Kingdom*[2] the Court examined the country background information as it was in 2003 and considered that the evidence did not disclose 'a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships.' In view of the scarce material on actual prosecutions based solely on sexual conduct the Court concluded that a tenuous and hypothetical basis of Article 3 treatment occurring was insufficient to find that the applicant's expulsion would violate that provision of the Convention. Implicit in the Court's reasoning is the assumption that the applicant would be 'discreet' about his sexual orientation in Iran beyond the privacy of his home. A similar conclusion based upon the same type of reasoning was reached in *I.I.N. v. the Netherlands.*[3]

The majority in this case has concluded that even if the applicant has 'to be 'discreet' about his private life' for some time following his expulsion to Libya, this would not involve a permanent or protracted suppression or concealment of an important part of his identity and thus would not reach the threshold necessary to violate Article 3 of the Convention (§ 88). I disagree with the majority's approach and conclusion. The fact that the applicant could avoid the risk of persecution in Libya by exercising greater restraint and reserve than a heterosexual in expressing his sexual orientation is not a factor that ought to be taken into account.

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[1] I accept that the applicant's general truthfulness has been undermined by a number of inconsistencies referred to in the judgment. However, neither the Migration Courts nor the Government have questioned the applicant's sexual orientation or the authenticity of his relationship with N. which is recognised as a same-sex marriage under domestic law.

[2] *F. v. the United Kingdom* (dec.), no. 17341/03, 22 June 2004.

[3] *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

Significant developments have taken place over the last decade in the national laws of contracting parties, in International law and in European asylum law in relation to claims to refugee status based on sexual orientation and/or gender identity. Whilst this case is not about refugee status, it does involve the expulsion—for an unknown period of time—of a gay man to Libya where he faces a real risk of persecution because of his sexual orientation. The relevant principles, therefore, can be applied *mutatis mutandi* and, to my mind, it is time for this Court to endorse them.

The United Kingdom Supreme Court, for example, in its decision in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*[1] marked a clear departure from the 'risk of criminal prosecution' approach as outlined in this Court's jurisprudence of ten years ago. In its landmark judgment of 7 July, 2010, that Court held, unanimously, that the 'reasonably tolerable test' of 'being discreet' was objectionable because no heterosexual person would find such constraints on being open about their sexual orientation to be reasonably tolerable.[2]

In 2012, the United Nations High Commissioner for Refugees published Guidelines on International Protection in this area.[3] Those Guidelines affirm that sexual orientation and/or gender identity are fundamental aspects of human identity that no person should be required to suppress.[4] The UNHCR notes numerous decisions in multiple jurisdictions which confirm that respect for fundamental human rights cannot be consistent with the requirement that a person conceal an aspect of his or her identity.

The Court of Justice of the European Union in *Minister voor Immigratie en Asiel v. X, Y and* Z endorses this general principle.[5] In November of last year, that Court considered it:

> '*important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it*'.[6]

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[1] United Kingdom Supreme Court judgment, 7 July 2010, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.
[2] Ibid., § 77 and § 80
[3] 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, 2012.
[4] See § 12 of the Guidelines.
[5] See Court of Justice of the European Union, (Joined cases C-0199/12, C-200/12 and C0201/12), *Minister voor Immigratie en Asiel v. X, Y and Z*, 7 November, 2013.
[6] § 70

In an earlier case it had ruled that the fact that a person could avoid a risk of persecution in Pakistan by abstaining from certain religious practices was, in principle, irrelevant.[1] Adopting the same approach to a different aspect of personal identity (sexual orientation), the Court in *Minister voor Immigratie en Asiel v. X, Y and* Z ruled that an applicant for asylum 'cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution'.[2]

The majority's conclusion in this case does not 'fit' the current state of International and European law on this important question of fundamental human rights. Recent developments, based as they are upon the recognition of the equal value and dignity of all persons regardless of their gender identity or sexual orientation, are to be welcomed.[3] Having recited those developments in its judgment, the majority then reverts to the old 'reasonably tolerable' test laid down by this Court over a decade ago. It considers that the 'discretion' requirement for a certain period of time in order to avoid persecution is tolerable. Its rationale is that such a requirement for a homosexual person does not involve a permanent or protracted concealment or suppression of an important part of personal identity (§ 88).

The reasoning is flawed and unconvincing. With this judgment, the Strasbourg Court introduces a new test of 'duration' that is not to be found elsewhere in comparative European law. The asylum case law of the Court of Justice of the European Union (the 'CJEU') imposes no such 'time' requirement. An applicant cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution—period.[4] The requirement to conceal sexual orientation is, in itself, incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.[5] What counts, for the CJEU, 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.[6]

An important factor in the UK Supreme Court's decision to reject 'being discreet' as a requirement was that it was based upon the wrong

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[1] *Bundesrepublik Deutschland v. Y* (C-71/11) *and Z* (C-99/11), 5 September 2012 § 79.
[2] *Minister voor Immigratie en Asiel v. X, Y and* Z, § 71.
[3] Although the Legal Position of the Head of the Legal Department of the Migration Board relating to protection on the basis of sexual orientation (see § 36 of the Judgment) is said to reflect the test set out by the UK Supreme Court—it is clear that, in this applicant's case, the requisite test was not applied by the domestic authorities thus, at the very least, indicating a procedural violation under Article 3 of the Convention.
[4] Court of Justice of the European Union, (Joined cases C-0199/12, C-200/12 and C0201/12), *Minister voor Immigratie en Asiel v. X, Y and* Z, 7 November, 2013 at § 71.
[5] Ibid. § 70
[6] Ibid. § 75

assumption. Had it been applied to Anne Frank, it would have meant, hypothetically, that she could have been returned to Nazi-occupied Holland as long as denying her religion and hiding in an attic were a 'reasonably tolerable' means of avoiding detection. The absurdity of that argument is not diminished by the fact that the requirement to hide in an attic to avoid detection might involve only months rather than years.

There are other flaws in the majority's approach. There is an assumption, at least, an implicit one, that sexual identity is, primarily, a matter of sexual conduct which – if not publicly displayed or discussed by the applicant – would eliminate any risk of harm being visited upon him. Sexual orientation is, of course, something far more fundamental than sexual conduct and involves 'a most intimate aspect of private life' (*Norris v. Ireland*, 26 October 1988, § 46, Series A no. 142). It is inherent to one's very identity and it may be expressed in a myriad of ways. The practical consequences for this applicant of the requirement that he be 'discreet' when returned to Libya are nowhere considered in the judgment. At the most basic level, if a gay man were to live discreetly, he would, in practice, have to avoid any open expression of his sexual orientation.[1] He would have 'to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised'. Not only would he be unable to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted and committed to another man in a foreign jurisdiction.

In finding that the 'discretion' requirement is insufficient 'to reach the threshold of Article 3', where, one wonders, does the majority find the yardstick to measure the level of suffering which this applicant would find reasonably tolerable? How would the majority measure the equivalent level for a straight man forced to suppress his sexual identity for many months or longer?[2] The answer surely is, as Lord Rodger stated, 'that there is no relevant standard since this is something which no one should have to endure'.[3]

Finally, the majority's approach ignores the fact that even if the applicant succeeds in hiding his sexual orientation after expulsion to Libya, the risk of discovery of the truth is not, necessarily, a matter determined entirely by his own conduct. Apart from the distress of having to lie about and conceal important aspects of his personal life on a regular basis, the applicant would be obliged to travel to a Swedish Embassy in Egypt or

[1] These examples are cited by Lord Rodger in his opinion in the *HJ (Iran)* judgment § 77.

[2] Whilst the majority considers that the application process could take four months *if* he is granted priority (there being no certainty in this regard), the reality is that the length of time in which this applicant would be required to live discreetly in Libya whilst waiting for his application to be processed is simply unknown. Additionally, there is, of course, no guarantee that his application would be successful.

[3] Opinion of Lord Rodger, *HJ (Iran) v. Secretary of State* (cited at n. 4 above) § 80.

Algeria for an interview. Homosexual acts are criminalised, directly or indirectly, in those countries. It is inconceivable that the interview process for family reunification could be conducted without disclosure of his sexual orientation. This clearly carries the risk that his sexual orientation—perceived as 'criminal'—would be disclosed to the authorities at that point and his carefully woven cover 'blown'.

This Court has held that to deprive a person of his reading glasses for a few months reaches the required threshold under Article 3.[1] Depriving this applicant of his dignity for a similar or longer period by expecting him to hide an intrinsic part of his identity for fear of persecution does not. Something doesn't fit. It is more than a minor inconvenience for the applicant to do as the majority requires. Having to hide a core aspect of personal identity cannot be reduced to a tolerable bother; it is an affront to human dignity—an assault upon personal authenticity. Sexual orientation is fundamental to an individual's identity and conscience and no one should be forced to renounce it—even for a while. Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity.

[1] *Slyusarev v. Russia*, no. 60333/00, 20 April 2010.