



## Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA

### Sexual minority asylum claimants in the jurisprudence of the Strasbourg Court: A chronology

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3 May 2019

The European Commission of Human Rights and the European Court of Human Rights (Strasbourg Court) have had a growing number of opportunities throughout the years to establish a position in relation to sexual minority asylum claims (SMACs).<sup>1</sup> The first time the Court came close to expressing its opinion on sexual minority asylum was in 1990, in *B. v. United Kingdom*, when a gay Cypriot man claimed his deportation to the Turkish Republic of Northern Cyprus (TRNC) would constitute a violation of Articles 8, 13 and 14 ECHR, in the light of the criminalisation of same-sex acts in TRNC and the intimate relationship the applicant had developed with a British citizen in the meantime.<sup>2</sup> In the asylum-related aspects of the application, the Commission asserted that ‘while the evidence indicates that the applicant might at some stage in the future be subject to the risk of prosecution for homosexual acts it does not indicate that the risk is high’, and privileged the UK’s immigration control prerogatives. The Commission thus held the application inadmissible for being manifestly ill-founded. Almost a decade later, in 1998, the Commission again dealt with a sexual minority

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<sup>1</sup> For an overview, including information regarding the applicants, main legal bases and key outcomes, see table of European jurisprudence available online: <http://www.sogica.org/database/ferreira-sogica-tables-of-european-sogi-asylum-jurisprudence-2019/>. This table excludes the decision in *Ayegh v. Sweden*, Application no. 4701/05, 7 November 2006, as this case involves same-sex sexual acts (the applicant’s son being raped and abused by his school headmaster in Iran), but neither the applicant herself nor sexual orientation as such (the sexual acts forced upon the applicant’s son do not say anything about his sexual orientation, not even perceived).

<sup>2</sup> *B. v. United Kingdom*, Application no. 16106/90, 10 February 1990.



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asylum case in *Shahram Sobhani v. Sweden*, where an Iranian gay man who applied for asylum in Sweden on grounds of his homosexuality saw his claim denied.<sup>3</sup> Whilst his application to the European Commission of Human Rights for violation of Articles 2, 3 and 8 ECHR was being considered, the Swedish Government quashed the expulsion order and granted the applicant a permanent residence permit, thus leading the claimant to withdraw his application and the application to be struck out by the European Commission of Human Rights.

Subsequently, in 2003, the Strasbourg Court dealt with *F. v. United Kingdom*,<sup>4</sup> involving an Iranian homosexual who left Iran after the authorities became aware of his homosexual relationship, following a period in detention and release upon a bribe payment. The UK authorities questioned F.'s credibility and found it unlikely that F. would be punished in Iran for his homosexuality. The Strasbourg Court dismissed claims on the basis of Articles 2, 3, 5, 6 and 8 ECHR as manifestly unfounded, as it considered that there was no active prosecution by authorities of adults involved in consensual and private homosexual relationships. Soon afterwards, in 2004, the Strasbourg Court dealt with a similar case – *I.I.N. v. the Netherlands* – again relating to a gay Iranian asylum claimant, this time claiming asylum in the Netherlands and claiming a violation of Article 3 ECHR.<sup>5</sup> In this case, the applicant not only came into contact with the Iranian authorities due to his homosexuality, but also due to his participation in protests. I.I.N. also claimed that he had been raped by a policeman

<sup>3</sup> *Shahram Sobhani v. Sweden*, Application no. 32999/96, 10 July 1998.

<sup>4</sup> *F. v. United Kingdom*, Application no. 17341/03, 22 June 2004.

<sup>5</sup> *I.I.N. v. the Netherlands*, Application no. 2035/04, 9 December 2004. This decision relied on the decision of the UN Committee Against Torture in *K. S. Y. v. the Netherlands*, Communication No. 190/2001, 15 May 2003, CAT/C/30/D/190/2001. In this case, a gay Iranian sought asylum in the Netherlands and saw his claim denied. He then filed a complaint before the Committee Against Torture, on the grounds that his deportation to Iran would violate Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. K.S.Y reported having been tortured and sentenced to death in Iran due to his homosexuality. Both the torture suffered and post-traumatic stress disorder were confirmed by medical reports. In a surprisingly short decision – six paragraphs – the consideration of the complaint's merits lacked any detail and the Committee subscribed to the Dutch authorities' arguments: there was no active policy of prosecution of homosexuals in Iran, and the claimant's account lacked credibility.



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twice. The Dutch authorities did not consider the applicant's account credible, and dismissed his asylum claim. Similarly to *F. v. United Kingdom*, the Court found the application manifestly ill-founded.

It was not until 2011 that the Strasbourg Court again had to deal with a sexual minority asylum case. In *R.A. v. France*, a Pakistani gay man complained that the denial of asylum and his return to Pakistan constituted a violation of Articles 2, 3 and 13 together with 2 and 3 ECHR.<sup>6</sup> The Court did not have the opportunity to decide on the substance of the claim, because the applicant lost contact with the legal representative and the case was struck out. Similarly, in *D.B.N. v. United Kingdom*, the Court struck out the case owing to the applicant having lost contact with her legal representative and apparently having left the country.<sup>7</sup> Crucially, the applicant in *D.B.N. v. United Kingdom* was the first lesbian asylum claimant filing a case with the Strasbourg Court, specifically complaining that her return to Zimbabwe would violate Articles 2, 3, 8, 13 together with 3, and 14 together with 3 and 13 ECHR.

The subsequent year, in *A.S.B. v. the Netherlands*, a gay Jamaican man was denied asylum by the Dutch authorities, despite his fear of persecution in Jamaica due to his sexual orientation.<sup>8</sup> During the procedure, the Dutch authorities granted the claimant an asylum-based residence permit, leading the Strasbourg Court to strike out the case as well. Still in 2012, in *K.N. and Others v. France*,<sup>9</sup> a gay Iranian man claimed that his return to Greece, under the EU 'Dublin regulation' system,<sup>10</sup> would constitute a

<sup>6</sup> *R.A. v. France*, Application no. 49718/09, 8 February 2011.

<sup>7</sup> *D.B.N. v. United Kingdom*, Application no. 26550/10, 31 May 2011.

<sup>8</sup> *A.S.B. v. the Netherlands*, Application no. 4854/12, 10 July 2012.

<sup>9</sup> *K.N. and Others v. France*, Application no 47129/09, 19 June 2012.

<sup>10</sup> Regulated at the time by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10, replaced in the meantime by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ



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violation of Articles 2, 3, and 13 together with 2 and 3 ECHR. In the light of the subsequent Court's decision in *M.S.S. v. Belgium*,<sup>11</sup> the French authorities decided to suspend the return of the applicant to Greece and to examine the asylum claim themselves, which led the Court to strike out the application. This case stands out as the only 'Dublin return' case amongst the Strasbourg sexual minorities asylum jurisprudence, but the Court did not make any particular consideration in regards to the applicant's sexuality in this context.

Soon afterwards, in 2013, the Court took its decision in *M.K.N. v. Sweden*, where the Court finally recognised that SMACs fall within the remit of the ECHR.<sup>12</sup> The case concerned an Iraqi Christian gay man refused asylum in Sweden and conflated a fairly unique range of elements: M.K.N. claimed that he was persecuted due to his religious beliefs and economic (relatively good) condition, and that there was no possibility of internal relocation to the Kurdistan region. He also claimed that after his departure, the Mujahedin found out about a homosexual relationship he had had, and his partner had been stoned to death. M.K.N. attributed the late disclosure of this element of his account to not knowing that homosexuality was (socially and legally) accepted in Sweden. Yet, the Swedish Migration Board claimed that M.K.N.'s account was not credible. The Migration Court reiterated this assessment of lack of credibility owing to late disclosure. Before the Strasbourg Court, M.K.N. claimed to have provided a reasonable explanation, and asked to be given the benefit of the doubt. The Swedish Government asserted that, as the claimant intended to go on living with his wife, there was no risk of him demonstrating his sexual orientation upon return, and at any rate there were internal relocation alternatives. The Strasbourg Court agreed with the importance of affording the benefit of the doubt to asylum claimants, but eventually sided with the Swedish authorities regarding the possibility of internal relocation and

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L 180, 29.6.2013, p. 31–59.

<sup>11</sup> *M.S.S. v Belgium and Greece*, Application no. 30696/09, 21 January 2011.

<sup>12</sup> *M.K.N. v. Sweden*, Application no. 72413/10, 27 June 2013.



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the credibility assessment, in particular in relation to the claimant's homosexual relationship. The Court thus held that returning the claimant to Iraq did not constitute a violation of Article 3 of the ECHR.

Crucially, in 2014, the Court took its infamous decision in *M.E. v. Sweden*.<sup>13</sup> In this case the Court had to deal with the case of a Libyan asylum claimant in a same-sex relationship in Sweden who had been required to return to Libya to obtain a family reunification visa. Although the Swedish Migration Board considered the applicant's account to be non-credible, judicial instances did not question M.E.'s homosexuality. Yet, for family reunion purposes, M.E. was required to return to Libya and apply for a visa there, despite having been the target of death threats from his family for having married someone of the same sex in Sweden. The Strasbourg Court found that requiring that the claimant be 'discreet' about his sexuality (effectively 'concealing' it) for a period of time in Libya was not a violation of Article 3 ECHR. This decision was severely criticised in a powerful dissenting opinion by Judge Power-Forde, who stated that 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' and that the 'reasoning is flawed and unconvincing'. Whilst this decision was being referred to the Court's Grand Chamber, the Swedish Migration Board decided to grant the applicant a permanent residence permit due to the deterioration of conditions in Libya, leading the Court to strike out the case.<sup>14</sup>

Pursuing this line of reasoning sceptical of SMACs, in 2015 the Court denied another claim. In *A.E. v. Finland*, the Court was asked to determine whether the deportation of a gay Iranian man would violate Article 3 ECHR.<sup>15</sup> The applicant, also Kurd and Muslim, explained how his other gay friends in the village where he grew up had been

<sup>13</sup> *M.E. v. Sweden*, Application no. 71398/12, 26 June 2014.

<sup>14</sup> *M.E. v. Sweden*, Application no. 71398/12, 8 April 2015.

<sup>15</sup> *A.E. v. Finland*, Application no. 30953/11, 22 September 2015.



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caught by the police at a private party and arrested, as well as how the police also searched for him. The Finnish authorities denied his asylum claim on the basis that Iran was a 'relatively tolerant' country towards gay men provided they did not exercise it in public (something not confirmed by the applicant's experience) and that to apply the death penalty a high threshold had to be met. The Finnish authorities also claimed that internal relocation was possible. After a succession of appeals, the Finnish authorities eventually conceded a continuous residence permit for work for one year, with a possibility to request a renewal. This was enough for the Court to consider the case 'resolved', and thus strike out the application.

A very similar claim followed, namely *A.N. v. France*.<sup>16</sup> The case concerned a gay, Muslim Senegalese man, who reported having been victim of blackmail, physically assaulted by rioters, and held captive and violently assaulted by relatives in his home country. The French authorities denied his asylum claim on the basis that he lacked credibility, owing to the vague and stereotyped clarifications offered and the applicant's lack of knowledge about the gay environment in Dakar. The applicant submitted a medical certificate and two testimonies evidencing the violence he had suffered, and also justified not having been open about his sexuality in France owing to fear of discrimination by his diaspora community. The Court found that enforcement of the criminal norm punishing same-sex conduct in Senegal was not 'systematic', and it subscribed to the French authorities' assessment of the facts, thus accepting the 'verdict' of lack of credibility. The Court thus concluded that the application was manifestly ill-founded.

A few months later, in *O.M. v. Hungary*,<sup>17</sup> the Strasbourg Court dealt with the case of an Iranian gay man who was detained for two months in Hungary and then granted

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<sup>16</sup> *A.N. v. France*, Application no. 12956/15, 19 April 2016.

<sup>17</sup> *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016.



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refugee status. In a more positive approach to these claims than seen in all previous decisions, in *O.M. v. Hungary* the Court found that there had been a violation of Article 5 ECHR, especially due to the authorities disregarding the particular vulnerability of O.M. during his detention, and awarded the claimant compensation. The positive decision in *O.M. v. Hungary* had given hope for a Court more sensitive towards sexuality minority applications in the context of asylum. Nonetheless, what has followed is a long string of struck out applications, quickly dashing any such hopes for a more supportive Court.

Still in 2016, the Court decided on *M.B. v. Spain*,<sup>18</sup> relating to a lesbian asylum claimant – significantly, one of only two lesbian cases in the whole Strasbourg jurisprudence on SMACs. M.B. came from Cameroon – where homosexuality is criminalised – and claimed asylum in Spain on grounds of the persecution she suffered in her home country at the hand of the family of her deceased husband on grounds of her sexuality. She also feared repercussions for refusing to marry her brother-in-law, as the ethnic traditions that applied to her required. Her asylum claim was refused by the Spanish authorities for lacking credibility. Whilst M.B.’s claim of violation of Articles 2 and 3 ECHR was being analysed by the Strasbourg Court, the Spanish authorities decided to re-open the administrative procedure and re-examine the asylum claim in question, so the Court struck out the application.

The year of 2017 turned out to be the most fertile year for sexual minority asylum cases in Strasbourg. The year started with *H.A. and H.A. v. Norway*, where two Iranian brothers claimed their deportation to Iran would violate Articles 2, 3, 8 and 13 ECHR.<sup>19</sup> The bulk of the claim relates to persecution on grounds of religion, and sexual orientation is only mentioned briefly on account of the first applicant stating that ‘his

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<sup>18</sup> *M.B. v. Spain*, Application 15109/15, 13 December 2016.

<sup>19</sup> *H.A. and H.A. v. Norway*, Application no 56167/16, 3 January 2017.



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father had alleged that he was homosexual'. Yet, the case remains interesting on two accounts: sexual orientation appears here as a perceived, not actual characteristic of the applicant, and the applicant seeks asylum on multiple grounds for persecution. The application was held manifestly ill-founded and declared inadmissible for a range of reasons pertaining mostly to the religious persecution claim, but as far as sexual orientation is concerned, it is striking that the Court brushed it aside by simply stating that 'the Court sees no grounds to deviate from the conclusions drawn by the domestic authorities', namely that 'it was unlikely (...) that he would risk persecution due to his father's allegations that he was homosexual'. *A.T. v. Sweden* related to another gay Iranian man to whom the Swedish authorities refused asylum, leading the applicant to lodge an application to the Strasbourg Court for violation of Articles 2 and 3 ECHR.<sup>20</sup> The Court struck out the application when the Swedish authorities considered the expulsion order statute-barred and accepted a fresh asylum claim.

Later in 2017, the Court decided on another case concerning Spain – *E.S. v. Spain* – but this time involving a gay Senegalese man.<sup>21</sup> The Spanish authorities denied the asylum claim on the basis that the applicant lacked credibility, as his declarations had been contradictory and insufficient. Despite a supportive statement from the UNHCR at appeal stage, the Spanish authorities confirmed the initial decision. In a further appeal, a Spanish court found that the wrong procedure had been followed and ordered that the claim be re-assessed. On this basis, the Strasbourg Court struck out the claim relating to the violation of Article 13 in connection to Articles 2 and 3 ECHR, and held the claim relating to the violation of Articles 2 and 3 ECHR as premature.

A fourth decision in 2017, *I.K. v. Switzerland*,<sup>22</sup> a gay Sierra Leonean man claimed that, although his family had accepted his sexuality, the police and religious groups

<sup>20</sup> *A.T. v. Sweden*, Application no. 78701/14, 25 of April 2017.

<sup>21</sup> *E.S. v. Spain*, Application no 13273/16, 19 October 2017.

<sup>22</sup> *I.K. v. Switzerland*, Application no. 21417/17, 19 December 2017.



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had attacked him following his participation in a protest in favour of same-sex marriage. The applicant also explained how he had been imprisoned for five days and subsequently been a victim of blackmail. The applicant was, however, found to lack credibility, in particular in relation to his sexuality and activities within an LGBTI organisation in Sierra Leone. Furthermore, the Swiss authorities found that although same-sex acts between men were a criminal offence punishable with between 10 years of imprisonment and life sentence, the law was not enforced provided gay men 'practiced' their homosexuality in 'hiding'. In its decision, the Court deferred to the domestic authorities' assessment of the applicant's credibility. Consequently, the Court found the application manifestly ill-founded and declared it inadmissible. Nonetheless, the Court's decision in *I.K. v. Switzerland* seems to signal a change in rhetoric, insofar as the Court acknowledges sexual orientation as a fundamental characteristic, talks about the need to be sensitive in the assessment of applicants' credibility and asserts the inappropriateness of 'concealment reasoning' in asylum claims. At any rate, the outcome remained negative, which suggests there is still a long way to go until the Court is ready to truly protect the rights of SMACs.

In the fifth and last case in 2017 – *M.B. v. the Netherlands* – the application was again struck out.<sup>23</sup> The case regarded a gay Guinean man. The applicant had had a romantic relationship with another man in Guinea, but when caught having sexual intercourse with him, a mob attacked them and killed the applicant's partner. Following this incident, the applicant was convicted, imprisoned and fined. The Dutch authorities believed the applicant's sexuality, but found the relationship and other events described as non-credible, having pointed out the lack of detail, namely about the partner. Although same-sex sexual conduct is a criminal offence in Guinea punishable with a prison sentence of between six months and three years, the Dutch authorities highlighted that there was no active policy of prosecution. In a fairly short decision –

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<sup>23</sup> *M.B. v. the Netherlands*, Application no. 63890/16, 21 December 2017.



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merely six paragraphs dedicated to the analysis of the violation of Article 3 ECHR – the Court deferred to the domestic authorities’ assessment of the applicant’s credibility and found that the Guinean criminal offence of same-sex conduct is not ‘systematically applied’. At the end, the Court found that the application – both in relation to Article 3 and 3 in connection with 13 ECHR – was manifestly ill-founded.

The year of 2018 brought another two decisions. The first one, in *M.T. v. France*, involved a gay Cameroonian man who became aware of his homosexuality around the age of 19, and had had same-sex relationships since then.<sup>24</sup> When his family found out about the applicant’s sexual orientation, they rejected him, reported him to the police and expelled him from home. In 2012, M.T. managed to leave Cameroon with the help of friends, and travelled to France, where he was hosted by one of his sisters. When this sister found out about M.T.’s sexuality, she too rejected him. He then met a French resident, whom he intended to marry, but, in the meantime, he was detained in Switzerland, handed to the French authorities and then made subject to an expulsion order and administrative detention. The Court did not analyse the substance of the applicant’s claim, as owing to the lack of reply from the applicant to the observations submitted by the French Government and third parties, the Court decided to strike out the application.<sup>25</sup>

The second 2018 decision – in *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia* – refers to an Uzbek gay man detained in Moscow.<sup>26</sup> What sets this case apart from all cases mentioned above is that the applicant is a publicly known journalist who regularly contributes to a weekly newspaper with national coverage – *Novaya Gazeta* – and who has dealt with a wide array of issues, including LGBTQI+ rights. Having been subjected to state-sponsored violence in Uzbekistan in the past, the applicant

<sup>24</sup> *M.T. v. France*, Application no 61145/16, lodged on 25 October 2016.

<sup>25</sup> *M.T. v. France*, Application no. 61145/16, 27 March 2018.

<sup>26</sup> *Khudoberdi Turgunaliyevich Nurmatov (Ali Feruz) v. Russia*, Application no. 56368/17, 2 October 2018.



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eventually claimed asylum in Russia, but the Russian authorities did not consider that the past ill-treatment, the applicant's sexual orientation or the criminal prohibition of homosexuality in Uzbekistan were sufficient reasons to grant asylum to the applicant. The applicant was placed in detention, and he claimed that his detention violated Article 5 ECHR and his expulsion to Uzbekistan would violate Article 3 ECHR. After several months in detention, the applicant was allowed to leave Russia and travel to Germany, where authorities granted him asylum. On this account, the Court struck out the Article 3 claim, as well as considering inadmissible the Article 5 claim.

2019 brought us yet another 'strike out' decision. *A.R.B. v. the Netherlands* concerned an Afghan gay man.<sup>27</sup> The applicant only mentioned his sexual orientation in a second asylum claim – in such an instance of 'late disclosure', the Dutch authorities found the applicant's sexual self-identification non-credible. The applicant claimed that his expulsion to Afghanistan would violate Article 3 ECHR. After lodging his application before the Strasbourg Court, the Dutch authorities granted a residence permit to the applicant. Although the applicant wished to pursue his application to claim compensation for having been forced to live on the streets for one and a half years, the Court struck out the case on the basis that the applicant no longer risked being returned to Afghanistan and no violation of an ECHR norm has been determined, so there was no room for analysing a just satisfaction claim.

There are now two sexual minority asylum cases pending before the Strasbourg Court. The first one is *O.S. v. Switzerland*, involving a gay Gambian man.<sup>28</sup> O.S. first applied for asylum in Switzerland under a false name and nationality, and saw his claim refused. Subsequently, he applied again for asylum, this time under his real name and nationality, and based on his homosexuality. This second asylum claim was also

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<sup>27</sup> *A.R.B. v. the Netherlands*, Application no. 8108/18, 17 January 2019.

<sup>28</sup> *O.S. v. Switzerland*, Application no 43987/16, lodged on 22 July 2016.



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refused. Subsequently the applicant entered into a registered same-sex civil partnership, and requested a residence permit based on his family status. This request was also refused by the Swiss authorities, who ordered his expulsion and required him to await the outcome of possible appeals against the refusal outside Switzerland. The applicant then filed a claim before the Strasbourg Court, arguing that being deported to Gambia – even if temporarily – would expose him to a real risk of arbitrary detention, imprisonment and torture, thus constituting a violation of Article 3 ECHR. This resembles the scenario in which M.E. found himself in *M.E. v. Sweden*, discussed above.

The second case pending – *S.A.C. v. United Kingdom* – relates to a Bangladeshi man described as gay/bisexual, and who overstayed a visitor’s visa to the UK.<sup>29</sup> His asylum claim on sexual orientation grounds was denied credibility by the UK authorities, including in relation to the claimant’s sexuality. Successive appeals were fruitless: although recognising credibility to the claimant’s sexuality, UK courts relied on country policy and information note regarding Bangladesh, which acknowledged the criminalisation of same-sex conduct but denied its enforcement.

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<sup>29</sup> *S.A.C. v. United Kingdom*, Application no. 31428/18, lodged on 5 July 2018.



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