Strasbourg Observers

B. and C. v Switzerland: between concealment of sexual orientation and risk assessment in Article 3 cases

January 15, 2021January 15, 2021 Guest Blogger B. and C. v. Switzerland, LGBT Rights, Non-refoulement, procedural obligations

*Blog post by Riccardo Viviani, LL.M., and Denise Venturi, Ph.D. Candidate in Law, KU Leuven, Research Unit Public Law (https://www.law.kuleuven.be/pub/en/staff/00108281)**

On 17 November 2020, the European Court of Human Rights (ECtHR) delivered its judgment in *B. and C. v Switzerland* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206153%22]}). The case concerned the risk of deportation and ill-treatment upon return to the Gambia of a homosexual applicant**, whose request for family reunification with his partner, a Swiss national, had been rejected. The Court unanimously found a violation of Article 3 of the Convention, following the inadequate evaluation of the risk of inhuman and degrading treatment and of relevant availability of State protection in the Gambia.

For the first time (https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf), in a *non-refoulement* case concerning a risk of ill-treatment for reasons of sexual orientation, the Court clarified that the lack of an adequate risk assessment by domestic authorities would breach Article 3. So far, similar cases (https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf) have been either struck out or have been declared inadmissible by Strasbourg judges.

This contribution will offer a brief analysis of the present judgment and will situate it in the wider context of the existing European case-law, namely the jurisprudence of the Court of Justice of the European Union (CJEU) and other precedents in which the ECtHR has dealt with Article 3 claims based on sexual orientation.

Facts

The first applicant is a Gambian national, who had registered in 2014 a same-sex partnership with the second applicant, a Swiss national. In December 2019, while the proceedings before the ECtHR were still ongoing, the Swiss applicant passed away.

The Gambian applicant had submitted three different applications for international protection in Switzerland. These asylum claims had been rejected due to a lack of credibility concerning episodes of past persecution and the fact that Gambian authorities were not aware of his sexual orientation. According to the Swiss Federal Administrative Court, since the applicant had failed to evince a concrete risk of ill-treatment, no evaluation on the treatment of LGBTIQ+ persons in the Gambia was required.

While the asylum procedure was ongoing, the Swiss applicant submitted a request for family reunification to obtain a residence permit for the first applicant in light of their registered partnership. However, this application was denied because of his partner's criminal record. Therefore, the Gambian applicant submitted a Rule 39 request to the ECtHR and obtained an interim decision, requiring the Swiss government to not deport him for the duration of the family reunification proceedings.

In the meantime, the appeal on the merits was also denied by the Federal Supreme Court, which contended that the expulsion of the applicant would have been a justified interference under Article 8 ECHR and that he had not submitted substantial grounds for believing he risked facing ill-treatment in case of return to the Gambia. In this respect, the Federal Supreme Court argued that the couple would have been able to maintain a long-distance relationship and that, therefore, the applicant would have not committed any same-sex act capable of drawing the attention of the national authorities or of the broader society in the Gambia.

Judgment

In their submission to the ECtHR, the applicants alleged that the deportation of the first applicant to the Gambia would expose him to treatment contrary to Article 3 of the Convention due to his sexual orientation. They also complained that the rejection of their request for family reunification violated their right to respect for private and family life under Article 8 of the Convention.

At the outset, making direct reference to its decision in the case of *I.K. v Switzerland* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180412%22]}), the Court clarified that sexual orientation is a characteristic fundamental to one's identity and that no one should be forced to conceal it. In disagreement with the assessment provided by the Swiss authorities, the Court contended that, even though the sexual orientation of the applicant had not been known at the time of his departure from the Gambia, such characteristic could actually come to the attention of Gambian authorities or of the broader society in case of deportation.

In light of these considerations, the Strasbourg judges directed their attention to the assessment of the risk of ill-treatment. In this respect, they largely confirmed the general principles expressed in *J.K. and Others v Sweden* (http://hudoc.echr.coe.int/eng?i=001-165442), where the Grand Chamber had clarified that, in asylum cases, national authorities should evaluate *proprio motu* the general situation of the country of origin.

As far as the assessment of the risk of ill-treatment by State actors is concerned, the Court contended that, while the deportation of LGBTIQ+ individuals to a country where same-sex acts are criminalized does not necessarily result in a violation of Article 3, it is crucial to assess how these laws are applied in practice. This view is consistent with its own legal precedent (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67880%22]}) and the current CJEU case-law (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=20931328). However, the Court took a step forward, stating that persecution by State authorities may also take the form of persecutory acts carried out by 'rogue' officers (see also UNHCR Guidelines on International Protection N. 9 (https://www.unhcr.org/509136ca9.pdf) quoted at para. 59). In this respect, the Court warned against the fact that the lack of information about such mistreatments in the Gambia may be due to under-reporting of episodes of discrimination and physical harm against the LGBTIQ+ community. Moreover, it noted that reliable country of origin information (COI) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825234/Gambia_-_SOGIE_-_CPIN_-_v2.0___August_2019_.pdf) shows how LGBTIQ+ individuals openly expressing their sexual orientation and/or gender identity are likely to face stigma and abuse from State actors.

On the other hand, in relation to the risk of ill-treatment by private actors, the Strasbourg judges considered that the Swiss authorities had conducted only a partial evaluation. This is because, the Swiss authorities had only taken into consideration the risk emanating from the family members of the applicant, and not from other private actors, such as his local community or the broader Gambian society. Conversely – and referencing again UNHCR Guidelines on International Protection No. 9 (https://www.unhcr.org/509136ca9.pdf) – the Court emphasized that inhuman and degrading treatment might as well emanate from private actors other than family members. In this respect, it acknowledged that the available COI, including the one contained in the third-party intervention (https://www.ilga-europe.org/sites/default/files/FINAL%20-%20INTERVENTION%20IN%20B%20and%20C%20v%20Switzerland%20_FINAL.pdf) submitted by ILGA-Europe, ECRE, the AIRE Centre and ICJ, confirmed an increase in homophobia and discrimination against LGBTIQ+ individuals in the Gambian society in recent years. It also mentioned that laws criminalizing same-sex relations might be a sign of unavailability of State protection against ill-treatment of LGBTIQ+ individuals.

In light of these COI, the Court pointed out that Swiss authorities should have evaluated *proprio motu* the availability of State protection, as indicated in the *J.K. and Others* (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22jk%20and%20others%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-165442%22]}) judgment. However, the Court observed, such assessment had not been carried out because the domestic authorities had wrongly assumed that the sexual orientation of the applicant would not have come to the attention of Gambian officers or of the Gambian society. For these reasons, the Strasbourg judges unanimously concluded that, without a fresh assessment of the aspects mentioned above, the deportation of the second applicant to the Gambia would give rise to a breach of Article 3.

As for Article 8 of the Convention, the Court ruled that there was no need to provide a separate evaluation under this provision, given its findings in relation to Article 3 and the circumstances of the case. As a matter of fact, the first applicant had not been deported during the family reunification proceedings in line with the interim measures adopted under Rule 39 and the question of the physical separation of the applicants no longer arose as the second applicant had passed away during the proceedings.

Commentary

The interpretation of the Court on the risk of ill-treatment for LGBTIQ+ individuals has slowly evolved over the years and the judgment at hand has finally taken a clear stance on the role of concealment in Article 3 cases.

Already in 2004, in the case of *F. v The United Kingdom* (http://hudoc.echr.coe.int/eng?i=001-24020), the Court had acknowledged that in theory the deportation of LGBTIQ+ individuals might expose them to ill-treatment because of their sexual orientation. However, that specific case was deemed inadmissible because, according to the judges, the applicant would have not been at risk of ill-treatment in Iran, had he lived his sexual orientation privately (see, along the same lines, the case of *Z. and T.* (http://hudoc.echr.coe.int/eng?i=001-72783) concerning religious persecution). As a matter of fact, at that time, the Committee against Torture (http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssh2tXWBhyLwahMw005n91WdS4o%2bG5IuDIOi80BMBvuNBWCc6R7x7uH2sXyOwGh1%2fnNkiU%2bjIZQRGOkqfZPBt%2f84%2fsZsWoAntLgZEU3DhogiR0sM81Wq2834In6MEqAXwGMTbRxamHUTuMMsoNLGOo%3d) also followed a similar interpretation in relation to the concealment of one's sexual orientation. In 2013, the CJEU addressed the issue of concealment with the *X., Y. and Z.* (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=20931328) judgment. The Luxembourg Court was very clear in declaring that requiring LGBTIQ+ asylum-seekers to hide their sexual orientation to avoid persecution is incompatible with the recognition of this characteristic as fundamental to the human identity.

This notwithstanding, the approach of the Strasbourg Court to concealment in sexual orientation cases kept being reflected in its own previous case-law. In 2014, the Court asserted that a temporary concealment of the applicant's sexual orientation in order to avoid persecution would not give rise to a violation of Article 3 (see *M.E. v Sweden* (http://hudoc.echr.coe.int/eng?i=001-145018)). The decision was strongly criticized by the dissenting opinion of Judge Power-Forde that highlighted the contrast not only between this judgment and the CJEU case-law, but also between this decision and the current state of international and European law. Similarly, also Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek made reference to the principles expressed by the CJEU on the issue of concealment in their joint separate opinion in the case of *F.G. v Sweden* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161829%22]}), where they rebutted the assumption that the applicant would have been able to avoid persecution in his country of origin, had he engaged in a discreet practice of his religion.

It was only with the admissibility decision in the case of *I.K. v Switzerland* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180412%22]}) that the Strasbourg Court explicitly stated that sexual orientation constitutes a fundamental aspect of the identity and conscience of a person and that applicants should not be expected to conceal it upon return to their country of origin.

Against this backdrop, the *B. and C.* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206153%22]}) judgment has finally provided a sound and well-argued legal reasoning on the issue of concealment. Interestingly enough, in doing so, the Court did not refer to the CJEU jurisprudence, in particular the *X., Y. and Z.* (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=20931328) judgment, but quoted its own legal precedent (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180412%22]}). This circumstance might be explained by the fact that the Strasbourg Court could already find within its own case-law the principle according to which no one should be forced to avoid persecution through concealment. Besides, both parties had made specific reference to the *I.K.* (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180412%22]}) judgment in their submissions.

In addition, it must be pointed out that since the first applicant had not claimed before the ECtHR to have suffered past persecution due to his sexual orientation, the judgment did not analyse extensively the relationship between past concealment and the future risk of ill-treatment. However, the Court did stress the fact that the sexual orientation of the applicant could actually come to the attention of Gambian authorities or society in case of forced return. On this point, it made a direct reference to paragraph 32 of the UNHCR Guidelines on International Protection No. 9 (https://www.unhcr.org/509136ca9.pdf), which underlines that, even if LGBTIQ+ individuals may try to avoid harm through concealment, the risk of discovery may not be confined to their own conduct.

This part of the judgment is particularly interesting because LGBTIQ+ individuals are often forced – sometimes even subconsciously – to hide their sexual orientation and/or gender identity to avoid persecution. Hence, they cannot necessarily prove that national authorities or private actors knew about their sexual orientation before their departure from their country of origin.

From Luxembourg to Strasbourg

The case under comment has sparked significant interest among international protection scholars. First and foremost, it is the first time (https://www.sogica.org/wp-content/uploads/2020/06/SOGICA-Tables-of-European-SOGI-asylum-jurisprudence-17-November-2020.pdf) that the Strasbourg Court found a violation of Article 3 of the Convention in a deportation case on grounds of sexual orientation. Second, this judgment offers further avenues of reflections which have the potential to foster the protection of LGBTIQ+ individuals.

By finding concealment clearly incompatible with the characterization of sexual orientation as fundamental to one's identity, the present decision squarely situates itself within the path traced by the CJEU case-law. The Court also underlined that concealment gives no guarantee against ill-treatment in case of return, irrespective of whether LGBTIQ+ individuals have successfully hidden their sexual orientation and/or gender identity in the past. It remains to be seen whether, with the present judgment, the Strasbourg judges have abandoned for good any concealment reasoning, even when required for a short time or in cases of past self-concealment. Moreover, the issue of whether concealment *per se* may reach the threshold of Article 3 of the Convention did not arise in the case at hand. Nonetheless, it would be interesting to follow the development of the Court's interpretation in this regard, should the facts of future cases allow for such a reasoning.

The present decision may also offer further avenues of reflections with regard to the contested issue (https://www.ilga-europe.org/sites/default/files/FINAL%20-%20INTERVENTION%20IN%20B%20and%20C%20v%20Switzerland%20_FINAL.pdf) of whether and to what extent the existence of laws criminalising same-sex acts may reach the threshold of Article 3. In affirming that the mere criminalisation of same-sex activities does not *per se* constitute persecution, the CJEU demanded that a thorough assessment be carried out by domestic authorities, taking into account all facts concerning the situation of the country of origin. The Strasbourg Court took a view consistent with the CJEU in requiring that criminal laws need to be applied in practice to prevent removal under Article 3. However, the role of non-State actors as sources of ill-treatment was not examined by the CJEU probably due to the boundaries imposed by the scope of the preliminary question in the *X., Y. and Z.* (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=20931328) case. In this respect, the ECtHR required national authorities to carefully analyse the risks that can just as well emanate from State officials, identified as 'rogue' officers, and from non-State actors. This aspect is of particular relevance when criminal laws are dormant, because even when rarely enforced, these legal norms can nonetheless contribute to a climate of homophobia and lead to persecution by non-State actors, as UNHCR has also observed (https://www.refworld.org/pdfid/5065c0bd2.pdf).

Arguably, the present judgment complements national authorities' obligations established by the CJEU. In other words, in Article 3 cases concerning LGBTIQ+ individuals, the risk assessment carried out by domestic authorities needs to take into consideration not only the legislative framework of the country of origin and its current implementation, but also the danger represented by 'rogue' officers and private actors in that specific context.

**The views expressed in this article are solely those of the Authors and do not necessary reflect those of the United Nations or the United Nations High Commissioner for Refugees.*

***The European Court of Human Rights uses the terms 'homosexual' and 'homosexuality' in the present judgment. In this blog post, we rather chose to avoid this terminology, as it is often considered outdated and derogatory to many people. See, for example, GLAAD Glossary of Terms (https://www.glaad.org/reference/lgbtq).*