

European Court of Human Rights' judgment inconsistent with refugee law

The ICJ expresses its disappointment today at the judgment of a Chamber of the European Court of Human Rights in the case of *M.E. v. Sweden* (Application No. 71398/12).

The organization considers that the Court has failed to keep pace with developments in refugee law relating to asylum claims based on sexual orientation, gender identity or expression.

The case arose from a failed application for asylum lodged in Sweden in 2010 by M.E., a Libyan national.

His asylum claim is based, among other things, on his fear of persecution and ill-treatment if returned to Libya on account of his homosexuality and his marriage to another man since his arrival in Sweden in accordance with Swedish domestic law which recognizes same-sex marriage.

The ICJ, together with the International Federation for Human Rights and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), submitted written comments about the case to the Court in 2013.

The European Court of Human Rights held that Sweden is entitled to expel the applicant to Libya even though consensual same-sex relations are criminalized in the country and punishable by imprisonment.

While the evidence before the Court did not feature reports of recent "active prosecutions" since the fall of Gadhafi, it did point to arrests and serious assaults taking place in Libya against people "simply for being homosexual".

The judgment will become final in three months unless one of the parties to the case requests that the case be referred to the Grand Chamber of the European Court for consideration.

The ICJ is concerned that the majority of the Court's Chamber held that removing M.E. to Libya would not be inconsistent with Article 3 of the European Convention on Human Rights, prohibiting torture or other ill-treatment.

The majority of judges reasoned that the case did not concern a permanent expulsion, but only a temporary one while Swedish authorities consider M.E.'s application for family reunification with his spouse.

The majority thus reasoned that it would be "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 suppress 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."

The ICJ shares the profound concern expressed by Judge Power-Forde in her dissenting opinion in the case: "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.... 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....".

Judge Power-Forde also highlighted 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... 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?"

The ICJ joins Judge Power-Forde in the view that the approach of the majority of the Court's panel in this case "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 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'."

The ICJ also concurs with Judge Power-Forde's considered opinion that the judgment of the majority of the Court's panel in this case is not consistent with "the current state of International and European law on this important question of fundamental human rights". For example, it is highly regrettable that the Court's majority judgment in this case is at odds with the November 2013 judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*, which held that an applicant for asylum "cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".