



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

FIRST SECTION

CASE OF A.A. v. SWEDEN

(Application no. 4677/20)

JUDGMENT

Art 2 + Art 3 • Expulsion (Libya) • Removal of Libyan national after refusal of asylum claim would not entail a breach • Security situation in Libya not such that there was a general need for international protection for asylum-seekers • Domestic authorities' assessment of applicant's individual circumstances thorough and based on rational grounds • Applicant's failure to substantiate a risk of being killed or subjected to ill-treatment on return

STRASBOURG

13 July 2023

FINAL

13/10/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of A.A. v. Sweden,

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

Marko Bošnjak, *President*,

Alena Poláčková,

Krzysztof Wojtyczek,

Ivana Jelić,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 4677/20) 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 A.A. (“the applicant”), on 21 January 2020;

the decision to give notice to the Swedish Government (“the Government”) of the complaints concerning Articles 2 and 3 and to declare the remainder of the application inadmissible;

the decision not to have the applicant’s name disclosed;

the decision to indicate an interim measure to the respondent Government under Rule 39 of the Rules of Court;

the parties’ observations;

Having deliberated in private on 22 June 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant, a Libyan national, was refused asylum in Sweden. He complained that his removal to Libya would be in breach of Articles 2 and 3 of the Convention.

THE FACTS

2. The applicant was born in 1988 and lives in Gothenburg. He was represented by Mr Tomas Fridh, a lawyer practising in Gothenburg.

3. The Government were represented by their Agent, Ms Helen Lindquist, of the Ministry for Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. FIRST SET OF ASYLUM PROCEEDINGS

5. The applicant arrived in Spain in July 2012, on a valid visa. He did not apply for asylum.

6. On 8 August 2012, under a false identity, the applicant arrived in Sweden and applied for asylum, citing risks due to threats from the Libyan mafia. By a final decision of 12 October 2012, the migration authorities decided to return the applicant to Spain under the Dublin Regulation (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 (recast), OJ 2013, L 180, p. 31). The decision was never enforced because the applicant absconded and his whereabouts were unknown.

II. SECOND SET OF ASYLUM PROCEEDINGS

7. On 7 May 2015, when the decision of 12 October 2012 was no longer enforceable, the applicant reapplied for asylum in Sweden. He presented an expired handwritten passport. He claimed that he risked being subjected to ill-treatment upon returning to Libya on account of his and his father's work for the Gaddafi regime. The applicant stated that he had worked for the Revolutionary Guards from 2006 to 2011 as an unpaid civilian at the university in Tripoli. In May 2011, to avoid an order to serve in the Revolutionary Brigade as a professional soldier, he had left Libya for Tunisia. After five months, in October 2011, when the situation had calmed down in Libya, he had returned to Tripoli, where on 15 April 2012 an arrest warrant had been issued in respect of him and served on his mother. He presented a copy of it. He had left for Spain some months later after obtaining a visa. His father, a high-ranking officer who had retired in 1997, had been summoned to serve once again in the army in 2011. He had been imprisoned on 15 April 2012 and had disappeared thereafter.

8. On 8 June 2017 the Migration Agency in Sweden (*Migrationsverket*) rejected the applicant's request for asylum and ordered his deportation to Libya, with a ban on his return for a period of two years. In its decision, having examined the relevant country information on Libya, the Migration Agency found that an internal armed conflict of a serious nature did prevail there, but that the indiscriminate violence could not be considered to be of such magnitude that all returnees would be at risk of being exposed to it. As regards the applicant's individual situation, the Migration Agency noted that the applicant had originally applied for asylum under a false identity, which had prevented his transfer to Spain and which had an adverse effect on his general credibility. The Migration Agency also considered that the arrest warrant submitted by the applicant – a copy allegedly scanned by his mother and sent to him via his mobile phone – was of a rudimentary nature and could easily have been falsified. The document did not state to whom it was addressed, nor did it contain any date or reason for the alleged arrest warrant.

It was therefore attributed a low evidential value. As to the applicant's alleged affiliation with the Gaddafi regime, the Migration Agency observed that he had not submitted any written evidence in support of that allegation, and that his oral statements were vague, lacked details and could not be considered reliable, in respect of either himself or his father. Regarding the information he had given about his moving to Tunisia in May 2011, returning to Libya in October 2011 and leaving for Spain in around July 2012, the Migration Agency observed that the applicant's passport contained several stamps showing lawful departures from and arrivals in Libya. In view of the fact that, after refusing to enrol in the military in May 2011, and after having an arrest order issued against him in April 2012, the applicant had not attracted the attention of the Libyan authorities during any of these departures from and arrivals in the country, and that he had in fact been granted a valid visa for Spain, as well as an extended passport, the Migration Agency concluded that the applicant had failed to substantiate that he was wanted in Libya. It was also observed that the applicant's mother, grandmother, younger brother and uncles were still in Libya.

9. On 21 November 2019 the Migration Court (*Migrationsdomstolen*) upheld the decision on appeal. It noted that the applicant had not explained why, in 2012, he had not relied on his alleged affiliation with the Gaddafi regime, but instead had cited threats from the Libyan mafia as a reason for his request for asylum. Moreover, before the Migration Court, the applicant had submitted additional warrants for his arrest, but they were all copies of a rudimentary nature, and the applicant had failed to provide a reasonable explanation as to why he could not obtain the original documents. As regards the security situation for Gaddafi supporters in Libya, the Migration Court found it remarkable that the applicant had decided to return to Libya in October 2011, since, according to relevant country information, at that time supporters of the Gaddafi regime had indeed risked imprisonment – an estimated 6,000 Gaddafi supporters had been imprisoned in temporary detention camps. The Migration Court also remarked on the ambiguity that, even though a warrant had allegedly been issued for his arrest in April 2012 and his father had been arrested at the same time, the applicant had remained in Libya until the end of July 2012, without any problems. He had even been granted a visa to enter Spain and had been allowed to leave Libya. Having made an overall assessment, the Migration Court concluded that the applicant had not plausibly demonstrated that there was a real and personal threat against him in Libya. Nor was he considered at risk in view of the prevailing security situation in Libya.

10. On 10 January 2020 the Migration Court of Appeal (*Migrationsöverdomstolen*) denied the applicant leave to appeal.

III. SUBSEQUENT PROCEEDINGS

11. On 27 January 2020, further to a request by the applicant, the Court applied Rule 39 of the Rules of Court until further notice. Accordingly, the Migration Agency decided to stay the enforcement of the expulsion order.

12. In the meantime, on 22 January 2020 the applicant applied for a residence permit on account of an offer of employment in Sweden. The Migration Agency rejected his application on 15 January 2021. Leave to appeal was refused by the Migration Court on 17 February 2021.

13. Furthermore, on 26 August 2020 the applicant lodged an application with the Migration Agency, claiming that there were impediments to the enforcement of the expulsion order, owing to his affiliation with the Gaddafi regime, the security situation in Libya and the fact that he had got married.

14. On 27 January 2021 his request was refused by the Migration Agency, which found that the applicant's ties to Sweden and his wife were not such that he would be eligible for a Swedish residence permit. Moreover, the general security situation in the applicant's habitual place of residence in Libya had not changed in such a way that the applicant could be considered in need of protection on that account.

15. On appeal, the decision was upheld on 3 March 2021 by the Migration Court.

16. On 8 April 2021 the applicant was refused leave to appeal by the Migration Court of Appeal.

17. The applicant's wife died on 23 July 2021.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

18. The basic provisions applicable in the present case, concerning the right of aliens to enter and remain in Sweden, are laid down in the Aliens Act (*utlänningslagen*, 2005:716).

19. 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 (Chapter 5, section 1, of the 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 (Chapter 4, section 1). 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).

20. Moreover, if a residence permit cannot be granted on any other grounds, a residence permit may be issued in cases where an overall assessment of the alien's situation reveals such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making this assessment, particular attention is to be paid to the alien's state of health, his or her adaptation to Sweden and the situation in his or her country of origin (Chapter 5, section 6).

II. RELEVANT EUROPEAN UNION LAW

21. 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 (OJ 2004 L 304, p. 12 – “the Qualification Directive”) regulates refugee status within the European Union legal order, and makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection as someone who would face a real risk of suffering serious harm if returned to his or her country of origin and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.

22. Article 15 of the Qualification Directive defines “serious harm” as consisting of:

- “(a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

III. RELEVANT COUNTRY INFORMATION ON LIBYA

A. United Nations High Commissioner for Refugees

23. The relevant part of the report of the United Nations High Commissioner for Refugees (UNHCR), “UNHCR Position on Returns to Libya – Update II”, issued in September 2018, reads as follows (footnotes omitted):

- “8. Violations and abuses of international human rights and humanitarian law continue to be perpetrated by all parties to the conflict with impunity for even the most serious of crimes. The most common violations and abuses reportedly include: arbitrary detention, abductions, enforced disappearances, torture and other forms of ill-treatment,

rape and other forms of sexual violence against both women and men, unlawful killings, including summary executions, forced displacement, as well as both targeted and indiscriminate attacks against civilians and civilian objects, including medical facilities, schools, mosques, etc. Men, women and children are reportedly at risk of being targeted for arbitrary arrest and kidnapping by armed groups and security forces affiliated with rival governments *'for financial or political gain, on the basis of their tribal origin or family identity, or for their perceived political affiliations and opinions'*. According to reports, those singled out for attacks include: fighters and civilians opposing or perceived to be opposing a party to the conflict; former Gaddafi loyalists; government officials and politicians; members of the judiciary and law enforcement; members of certain minority religious, ethnic or tribal groups; persons perceived to be violating 'public morals'; media professionals; human rights defenders and civil society activists; medical professionals; and humanitarian workers.

...

Access to Territory and International Protection

34. As the situation in Libya remains fluid and uncertain, UNHCR calls on all countries to allow civilians (Libyan nationals, former habitual residents of Libya and third-country nationals) fleeing Libya access to their territories.

35. All claims of nationals and habitual residents of Libya seeking international protection should be processed in fair and efficient procedures in accordance with international and regional refugee law. For individuals whose claim had been rejected previous to recent events, the current situation may, depending on the individual circumstances of the claim, give rise to changed circumstances, which need to be considered if a new asylum claim is submitted. UNHCR considers that persons having been directly affected by developments since 2011 may be at a particular risk of persecution or other forms of serious harm, including, *inter alia*, individuals opposing or perceived to be opposing a party to the conflict; government officials and politicians; members of the judiciary and law enforcement; members of certain minority religious, ethnic or tribal groups; individuals perceived to be violating 'public morals'; media professionals; human rights defenders and civil society activists; medical professionals; humanitarian workers; women engaged in the public sphere; individuals of (real or perceived) diverse sexual orientations and/or gender identities; and members of tribes/families or individuals perceived to be in support of the former Gaddafi regime. Persons with these and other profiles may be in need of international refugee protection in accordance with the 1951 Convention [relating to the Status of Refugees], for reason of real or imputed political opinion, or for reasons related to other 1951 Convention grounds. Claims need to be considered on an individual basis, carefully taking into account the particular circumstances of each case. Furthermore, UNHCR considers that persons fleeing Libya may be in need of international refugee protection in accordance with Article 1(2) of the 1969 OAU Convention [Convention Governing the Specific Aspects of Refugee Problems in Africa], or, in countries of asylum outside the African Union and in cases where the 1951 Convention criteria are found not to apply in the individual case, may meet the criteria for complementary forms of protection.

...

37. UNHCR commends any measure taken by States to suspend forcible returns of nationals or habitual residents of Libya, including those who have had their asylum claim rejected. UNHCR urges all States to suspend forcible returns to Libya until the security and human rights situation has improved considerably. Given the volatility of the situation, the fragmentation of control and the plethora of armed groups, UNHCR considers that in the current circumstances the relevance and reasonableness criteria for

an internal flight or relocation alternative are unlikely to be met. Suspension of forcible returns of nationals and habitual residents to Libya serves as a minimum standard and should not replace international refugee protection for persons found to meet the criteria for refugee status under the 1951 Convention and the 1969 OAU Convention. This advice is valid until such time as the security and human rights situation in Libya has improved sufficiently to permit a safe and dignified return.”

24. Paragraph 1 of the “UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea”, dated September 2020 (footnote omitted) reads as follows:

“This position supersedes and replaces UNHCR’s guidance on foreign nationals in Libya contained in the *Position on Returns to Libya – Update II* of September 2018; however, UNHCR guidance in relation to Libyan nationals and habitual residents as provided in the September 2018 position remains valid. It is based on information available up until 15 August 2020, unless otherwise stated.”

B. United Nations Security Council

25. The relevant part of the Report of the Secretary-General of 25 August 2021 on the United Nations Security Council/United Nations Support Mission in Libya (UNSMIL) reads as follows:

“...

2. Sustained efforts continued under United Nations auspices to advance Libyan-led and Libyan-owned dialogue processes in support of the ceasefire agreement, economic reforms and the holding of elections on 24 December 2021.

...

45. While the ceasefire has resulted in a dramatic reduction in civilian casualties, violations of human rights and international humanitarian law have continued, including by armed groups, as well as armed units associated with the Ministry of the Interior and the Ministry of Defence. During the reporting period, UNSMIL documented killings, enforced disappearances, conflict-related sexual violence, including rape, arbitrary arrests and detentions, attacks against activists and human rights defenders, and hate crimes.

...”

26. In its December 2022 Monthly Forecast on Libya, the United Nations Security Council stated as follows:

“Expected Council Action

In November, the Security Council will hold a briefing, followed by consultations, on the UN Support Mission in Libya (UNSMIL).

The mandate of UNSMIL expires on 31 October 2023.

Key Recent Developments

This month will mark one year since the postponement of national elections planned for 24 December 2021 and seven years since the signing of the Libyan Political Agreement (LPA). The leadership stand-off continues between incumbent Prime

Minister Abdul Hamid Mohammed Dbeibah, elected in February 2021 to head the interim Government of National Unity (GNU), and former Interior Minister Fathi Bashagha, who was elected interim prime minister by the House of Representatives (the Libyan legislature based in Tobruk) on 10 February. The protracted political stalemate contributes to the country's political, economic and security instability.

The ceasefire continues to hold, although there are reports of ongoing large-scale recruitment on both sides. There has also been some progress on the security track. On 27 October in Sirte, Special Representative for Libya and head of UNSMIL Abdoulaye Bathily convened the first joint meeting in several months of the 5+5 Joint Military Commission (JMC) – which consists of five representatives each from the former Government of National Accord and the Libyan Arab Armed Forces. At the meeting, the JMC agreed to establish a sub-committee for the disarmament, demobilisation and reintegration of armed groups.

On the economic track, the co-chairs of the Economic Working Group (Egypt, the EU, the US, and UNSMIL) held consultations on 9 November and agreed on the urgent need to assist Libyan institutions to coordinate proposals for temporary mechanisms until a government is elected and a national budget is agreed.

The human rights situation remains alarming, and violations against migrants and asylum seekers continue with impunity. As of mid-November, more than 70 inmates at Tripoli's Mitiga Central Prison were reportedly on a hunger strike to protest the prolonged arbitrary detention of many inmates; detention conditions; and ill-treatment, including denial of family visits and medical care.

...

On 28 October, the Security Council unanimously adopted resolution 2656, extending UNSMIL's mandate for one year, following five short-term extensions since September 2021. ...

Key Issues and Options

A key issue remains the precarious political, economic and security situations linked to Libya's uncertain electoral path. A related concern for the Council will be how to foster common political ground between the two rival governments so they can agree on a constitutional framework to pave the way for Libya's long-delayed elections. Council members could consider holding a closed Arria-formula meeting with Libyan civil society representatives to help generate ideas for promoting dialogue between the rival political factions in Libya and supporting an inclusive political process leading to elections. Another concern remains the alarming human rights situation.

..."

27. In "What's in Blue – Libya: Briefing and Consultations", posted on 24 February 2023, the Security Council stated, among other things:

"Regarding the security situation, the Secretary-General's most recent report on Libya, dated 9 December 2022, stated that the 2020 ceasefire agreement continues to hold, although the security situation remains tense throughout the country. The report also noted that UNSMIL has continued to support the establishment of an effective Libyan ceasefire monitoring mechanism able to coordinate, monitor, and assess progress on the withdrawal of foreign forces, foreign fighters, and mercenaries."

C. United Nations Office for the Coordination of Humanitarian Affairs

28. The Humanitarian Bulletin issued on 31 August 2021 by United Nations Office for the Coordination of Humanitarian Affairs (OCHA) Libya included the following passage:

“The beginning of 2021 witnessed general improvements in the security situation, opening access for displaced Libyans to return to their areas of origin. Nearly 65,000 displaced persons have returned since the start of the year, reducing the number of internally displaced people from 278,000 in December 2020 to 213,000 by the end of June 2021. Some 88 per cent of the displaced returned to their original homes, many of which were significantly damaged during the conflict, while thousands of Libyans are still unable to return due to damaged homes and the lack of basic services, such as electricity, water supply and waste management facilities. As reported in IOM’s [International Organization for Migration] DTM [Displacement Tracking Matrix] Round 37, damage to public infrastructure and housing remain the main obstacles preventing the return of most families displaced in Libya.

...”

D. United Kingdom Home Office

29. The United Kingdom Home Office’s report entitled “Country Policy and Information Note Libya: Actual or perceived supporters of former President Gaddafi”, dated April 2019 (now removed as out of date from the United Kingdom’s gov.uk home page), set out the following (footnotes omitted):

“2.4 Risk

2.4.1 In the country guidance case of ZMM (Article 15(c)) Libya CG [2017] UKUT 00263 (IAC) (28 June 2017), heard 3 May 2017, the Upper Tribunal issued new guidance on the issue of Article 15(c), replacing the previous country guidance case of FA (Libya: art 15(c)) Libya CG [2016] UKUT 00413 (IAC). FA had held that ‘the question of whether a person is at Article 15(c) risk in Libya should, until further Country Guidance, be determined on the basis of the individual evidence in the case’ (headnote para 1).

2.4.2 In ZMM, the Upper Tribunal (UT) held that: ‘The violence in Libya has reached such a high level that substantial grounds are shown for believing that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person.’ (para 94)

2.4.3 The country guidance case of AT and Others (Article 15c; risk categories) (CG) [2014] UKUT 318 (IAC) (14 July 2014) (heard 18-22 November 2013) held that:

‘In the aftermath of the armed revolution that brought about the fall of the dictatorial and repressive regime of Colonel Qadhafi (Gaddafi), the central government in Libya has relied on various militias to undertake security and policing functions. Those militias and the many others that operate within Libya, often have their own interests, loyalties and priorities which may or may not coincide with the interests of the central government’ (para 215 (1)).

2.4.4 In AT and Others, the Tribunal also held that having regard to the generally hostile attitude of society to the former regime, the following are, in general, at real risk of persecution or Article 3 ill-treatment on return to Libya:

- Former high ranking officials within the intelligence services of that regime (para 215 (3)(a)); and
- Others with an association at senior level within that regime (215 (3)(b));

2.4.5 The Tribunal also found that as a general matter the closer an individual was to the centre of power within the former regime, the more likely that the individual will be able to establish a risk of persecution or Article 3 ill-treatment on return (para 215 (4)). While the majority of the population of Libya worked for, had some association with, or has a member of the family who worked for or had an association with the Gaddafi regime, such employment or association alone is not sufficient to establish a risk of persecution or Article 3 ill-treatment on return (para 215 (5)).

2.4.6 The Tribunal found that in general, family members of former high ranking officials in the intelligence services or persons with an association at senior level with the regime are not at risk of persecution or a breach of their protected rights on return. It is possible, however, that an individual will be able to establish such a risk but this will need to be demonstrated by specific evidence relating to the individual's circumstances. Mere assertion of risk by association as a family member would not be sufficient without fact-specific evidence of the risk to that particular family member (para 215(6)).

2.4.7 Whilst there has been some regrouping of support for Gaddafi with the establishment of pro-Gaddafi political parties, the country situation has not changed significantly since 2013. Libya remains a failed state with rival governments and hundreds of armed groups vying for control and operating with impunity. There remains a generalised attitude of resentment towards perceived Gaddafi supporters and fighters (see Treatment of Gaddafi loyalists).

2.4.8 Given numerous reports of serious ill-treatment, it is likely that a person who was closely associated with the Gaddafi regime – particularly at a senior level, such as ministers, high ranking officials, diplomats and members of the security forces – and those closely associated with his family will be at risk of persecution or serious harm.

2.4.9 Each case must be considered on its specific facts, with the onus on the person to demonstrate that they are at risk of persecution or serious harm. If a person is not found to be at risk of persecution for a Refugee Convention ground in their home area, decision makers must consider whether they are likely to face serious harm as a result of the prevailing security and humanitarian situation in Libya under Articles 2 and 3 of the ECHR / Articles 15 (b) and (c) of the Qualification Directive. A person returning to Libya is likely, solely because of their presence in the country, to face a real risk of being subject to a threat to their life or person and a breach of Article 15(c) of the Qualification Directive.

...

5. Treatment of Gaddafi loyalists

...

5.2 Attacks against former Gaddafi supporters since 2011

5.2.1 According to the DFAT [Department of Foreign Affairs and Trade] 2018 Country Information Report on Libya:

‘A generalized attitude of resentment towards Gaddafi supporters and fighters is wide spread throughout Libya. This animosity derives from the conduct of the regime following the outbreak of conflict in 2011...

‘In June 2017, unidentified armed groups killed 12 detainees upon their conditional release from prison in Tripoli. All 12 were members of the former Gaddafi government and were accused of taking part in violence against anti-government protesters in 2011. On 29 July 2015, a mass trial of 28 senior regime figures resulted in 24 being convicted of crimes relating to the Gaddafi regime’s conduct during the 2011 conflict. Nine of the defendants, including Gaddafi’s son, Saif al-Islam al Gaddafi, were sentenced to death in a trial widely criticised by international observers (see Death Penalty). In the aftermath of the verdict, small scale pro-Gaddafi rallies took place in several Libyan cities, including Benghazi...

‘Actual or perceived former Gaddafi loyalists, and displaced persons in general, have been subjected to retaliatory attacks, harassment, intimidation, discrimination and other abuses as reported in 2018 by the UN Special Rapporteur on the human rights of internally displaced persons...

‘While some, limited, re-grouping of support for Gaddafi has emerged, a generalised attitude of resentment continues toward perceived Gaddafi supporters and fighters.’

5.2.2 The report continued with DFAT’s assessment that:

‘...those who were, or are perceived to have been, high-ranking officials in the Gaddafi regime (including Ministers, Senior Bureaucrats, Military Personnel or Diplomats), or who had close associations with the Gaddafi family, or those associated with the Libyan security forces during the 2011 conflict, face a high risk of both societal and official discrimination throughout Libya. This may include being illegally detained, beaten or tortured; having death threats made against themselves or their families; or being killed. The Gaddafi regime was in power in Libya for 42 years, from 1969 to 2011. Over such a long period of time, the majority of the population would have either worked for, had some association with, or had a member of the family who worked for, or had an association with the regime. DFAT assesses it is unlikely that a Libyan with a low-level association with the regime would face discrimination as a result of this association.’

5.2.3 The news agency, Al-Monitor, reported in May 2018 that Gaddafi supporters were arrested whilst attending peace talks in the Libyan capital of Tripoli. They were accused of ‘planning to destabilize Libya’. The article noted that the Gaddafi supporters included three former military officers, three activists and one university professor who had travelled to Tripoli from their ‘self-imposed exile in Cairo’.

5.2.4 The UNHCR ‘Position on Returns to Libya (Update II)’, published in September 2018, stated ‘Men, women and children are reportedly at risk of being targeted for arbitrary arrest and kidnapping by armed groups and security forces affiliated with rival governments “for financial or political gain, on the basis of their ... family identity, or for their perceived political affiliations and opinions”. According to reports, those singled out for attacks include: ...former Gaddafi loyalists ...’

...”

30. The United Kingdom Home Office’s Country Policy and Information Note, “Libya: Security and humanitarian situation”, dated September 2020, set out the following:

“ ...

2.4.21 There has not been a substantive change to the security situation since ZMM [cited above] was heard in May 2017. There are not, therefore, ‘very strong grounds supported by cogent evidence[‘] to justify a departure from ZMM as per para 47 of the Court of Appeal’s determination in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 (13 July 2012).

2.4.22 Consequently, a person returning to Libya is likely, solely because of their presence in the country, to face a real risk of being subject to a threat to their life or person and a breach of Article 15(c) of the Qualification Directive.

2.4.23 If a person does not qualify for a grant of asylum, or a grant of humanitarian protection under articles 15(a) or 15(b) of the Qualification Directive, and is not excluded from protection, they will qualify for humanitarian protection on the basis of a breach of Article 15(c) owing to the general security situation. ...”

E. Swedish Migration Agency

31. A report by the Swedish Migration Agency, “Libya – Security situation and its impact on the civilian population” (*Migrationsverket: Libyen – Säkerhetssituationen och dess påverkan på civilbefolkningen*), dated 31 March 2021, states as follows:

“The ceasefire signed in October 2020 looks set to last, but the situation is very fragile. The implementation of the ceasefire agreement looks set to drag on. The parties are accusing each other of further rearmament, with the support of aligned international players. Nor does the withdrawal of the foreign troops, which is to be completed under the agreement within 90 days, appear to be on schedule. More than 20,000 foreign combatants remain in the country and continue to assist the parties to the conflict, according to the United Nations. The foreign troops are mainly concentrated around Sirte, Jufra air base (500 km south of Tripoli) and al-Watiya on the border with Tunisia.

In March this year, new fighting broke out in Tripoli between GNA [Government of National Accord]-affiliated factions, Asharq al-Awsat reported. Furthermore, it is reported that armoured vehicles have again begun patrolling the streets of Tripoli since the ceasefire came into force. In addition, the residential area of Tajourah, east of the capital, has witnessed Turkish drone activity and an escalating military presence in the area. At the end of February, the former Interior Minister of the GNA government, Fathi Bashagha, was subjected to an assassination attempt when his motorcade was attacked in Tripoli.

In the eastern region of the country, there are reports of continued criminal activity, including murder, kidnappings and extortion, the United Nations Support Mission in Libya (UNSMIL) said in its report to the UN Secretary-General in January this year.

As a consequence, the ceasefire agreement has led to a change of power, at the expense of former political and security actors in the West and the East respectively. Actors who have previously benefited from the domestic political status quo now appear to be losing influence as a result of the new political agreement in connection with the ceasefire. The shift could give rise to internal and geopolitical rivalries, with the risk of further confrontations. Ongoing dealings over control and the distribution of oil revenues have hit the economy hard, while at the same time risking flare-ups in a new contentious issue between the parties, which could have major implications for the country’s political choices going forward.”

32. Another Swedish Migration Agency report (RS/074/2021, dated 31 May 2021), “Legal position – Security situation in Libya” (*Migrationsverket: Rättsligt ställningstagande – Säkerhetssituationen i Libyen*) states the following:

“The Migration Agency considers that there is still an internal armed conflict in Libya with the risk of civilians being affected without regard to their personal situation. It is therefore considered that there is an internal armed conflict with indiscriminate violence within the meaning of Article 15(c) of the Qualification Directive and Chapter 4, section 2, subsection 1, of the Aliens Act. However, the situation is not so serious that everyone is at risk of indiscriminate violence. An individual examination of the individual’s vulnerability must therefore be carried out.

The security situation in Libya is serious. Although there is currently a lower level of conflict, with sporadic attacks, due to the current ceasefire, this situation is extremely fragile with the risk of new confrontations. As there is great uncertainty about how the conflict will develop, it is very important to take into account current and relevant country information in each case.”

F. United States Department of State

33. The United States Department of State’s 2022 Country Report on Human Rights Practices in Libya set out the following in its executive summary:

“Libya’s interim Government of National Unity was selected by the 75-member UN-facilitated Libyan Political Dialogue Forum in 2019 and subsequently endorsed by the Libyan House of Representatives to govern the country until national elections. Following the postponement of elections originally scheduled for December 2021, the Government of National Unity’s legitimacy was challenged by a “Government of National Stability” that the House of Representatives endorsed in February in a vote that the UN assessed was not fully transparent and included reports of acts of intimidation prior to the session. As of year’s end, a new date for national elections had not been set. As a result, the Government of National Unity continued to govern the country on an interim basis, although its influence was limited outside of Tripoli and certain areas in the northwest. The nonstate actor known as the Libyan National Army, led by Khalifa Haftar, maintained significant de facto control in the east and south and welcomed the formation of the House of Representatives-endorsed “Government of National Stability” while maintaining independence from it.

The Government of National Unity maintained limited control over security forces, which consisted of a mix of semiregular and nominally integrated units, tribal armed groups, and civilian volunteers. The national police force under the Ministry of Interior oversaw internal security, supported by the armed forces under the Ministry of Defense. Civilian authorities had only nominal control of the police and the security apparatus; security-related police work generally fell to armed groups, which, while officially falling under security institutions, remained at least partially independent of state authority. Most of these nominally integrated armed groups supplemented their government funding with proceeds from licit and illicit activities and varied significantly in terms of training, supervision, and/or accountability. There were reports that members of security forces aligned with both the Government of National Unity and the Libyan National Army, including contracted elements of Russia’s Wagner Group supporting the Libyan National Army, committed numerous abuses. The

Government of National Unity and the Libyan National Army, along with other nonstate actors, largely upheld a 2020 cease-fire agreement, although both sides continued receiving support from foreign governments, military forces, fighters, and mercenaries. Officially constituted and nominally integrated armed groups filled security vacuums across the country. ISIS-Libya was active in the southwestern desert.

Significant human rights problems included credible reports of: unlawful or arbitrary killings; enforced disappearance; torture or other physical abuses perpetrated by armed groups on all sides; harsh and life-threatening conditions in prison and detention facilities; arbitrary arrest or detention; political prisoners or detainees; serious problems with the independence of the judiciary; arbitrary or unlawful interference with privacy; serious abuses in a conflict, including widespread civilian deaths or harm; serious restrictions on free expression and media, including violence against journalists and enforcement of or threat to enforce criminal libel laws to limit expression; substantial interference with freedom of association and peaceable assembly; refoulement of refugees and asylum seekers to a country where they would face torture or persecution; serious government corruption; lack of investigation of and accountability for gender-based violence; threats of violence targeting members of ethnic minority groups and foreigners; trafficking in persons, including forced labor; enforcement of or threat to enforce laws criminalizing consensual same-sex sexual conduct between adults; and significant restrictions on workers' freedom of association, including limits on collective bargaining and the right to strike.

Divisions between institutions affiliated with the Government of National Unity and those affiliated with the Libyan National Army, a security vacuum in the south, the presence of criminal groups throughout the country, and the government's weakness severely inhibited investigation and prosecution of abuses. The government took limited steps to investigate, prosecute, and punish officials who committed human rights abuses and acts of corruption within its area of reach; however, its limited resources, as well as limited political will, reduced its ability and willingness to prosecute and punish perpetrators.

Human rights abuses, by groups aligned with the government and the Libyan National army, nonstate and foreign actors including mercenaries from various countries, and terrorist organizations, were widespread throughout the year. These included killings, indiscriminate attacks on civilians, arbitrary detention, and torture."

THE LAW

ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

34. The applicant complained that his removal to Libya would be in breach of Articles 2 and 3 of the Convention, which read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. ... "

Article 3

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

A. Admissibility

35. The Government disagreed with the applicant's submission.

36. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

37. The Government acknowledged the concerns about the general security situation in Libya but maintained that it was not so serious as to exclude any removal to that country. They pointed out that all new relevant information had to be taken into account in order to make an *ex nunc* evaluation. As regards the UNHCR position report on returns to Libya dated 2018 (see paragraph 23 above), which at the time had recommended that States suspend forcible returns of Libyan nationals, the Government noted the recommendations made in paragraph 34 of the report that claims for international protection had to be made on an individual basis, carefully taking into account the particular circumstances of each case. Accordingly, it could not be concluded that the UNHCR at the relevant time had recommended that owing to the general security situation in the country, all asylum-seekers from Libya were in need of protection.

38. As to the applicant's individual circumstances, the Government referred to the findings of the domestic authorities that the applicant lacked credibility, and that he had failed to substantiate that he faced a real and concrete risk of being subjected to treatment contrary to Articles 2 and 3 upon returning to Libya.

39. The applicant contended that the general security situation in Libya had reached such a level that anyone being removed there would risk being subjected to treatment contrary to Articles 2 and 3 of the Convention. He referred in particular to the fact that the UNHCR (paragraph 37 of the report, quoted in paragraph 23 above) had urged all States to suspend forcible returns to Libya until the security and human rights situation had improved considerably, or sufficiently to permit a safe and dignified return.

40. As to his individual circumstances, the applicant referred to his previous statements during the domestic proceedings, and the arrest warrants submitted. He observed that the Government had not taken any steps to verify the authenticity of the arrest warrants submitted.

2. *The Court's assessment*

(a) *The general principles*

41. The Court observes that 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, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; and *F.G. v. Sweden* [GC], no. 43611/11, § 111, 23 March 2016). 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 implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).

42. If an applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken. This situation typically arises when, as in the present case, deportation is delayed as a result of the indication by the Court of an interim measure under Rule 39 of the Rules of Court. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *F.G. v. Sweden*, cited above, § 115, and *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 83 and 106, 23 August 2016).

43. A general situation of violence will not normally in itself entail a violation of Article 3 in the event of expulsion (see *H.L.R. v. France*, 29 April 1997, § 41, *Reports of Judgments and Decisions* 1997-III). However, the Court has never ruled out the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008).

44. When carrying out the risk assessment, it is a firmly established principle that the Court may obtain relevant materials of its own motion (see

H.L.R. v. France, cited above, § 37; *Hirsi Jamaa and Others*, cited above, § 116; and *J.K. and Others v. Sweden*, cited above, § 90). In a number of previous cases, the Court has set out the criteria for its assessment of materials thus obtained (see *F.G. v. Sweden*, cited above, § 117; *J.K. and Others v. Sweden*, cited above, §§ 88-90; and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 230-32, 28 June 2011).

45. In respect of an applicant's personal circumstances, it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. Therefore, as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection (see, among other authorities, *J.K. and Others v. Sweden*, cited above, § 96).

(b) The application of these principles to the present case

46. Throughout the domestic proceedings, the Swedish migration authorities and the courts concluded that the security situation in Libya was not such that there was a general need for international protection for asylum-seekers. This was also the view of the Swedish Migration Authority in its latest country report on Libya on 31 May 2021 (see paragraph 32 above).

47. By contrast, in September 2018 the “UNHCR Position on Returns to Libya – Update II” urged all States to suspend forcible returns to Libya until the security and human rights situation there had improved considerably (see paragraph 23 above).

48. Likewise, according to the United Kingdom Home Office's Country Policy and Information Notes on Libya from 2019 and 2020 (see paragraphs 29 and 30 above), the assessment by the Upper Tribunal in the country guidance case of *ZMM* (Article 15(c)) Libya CG [2017] UKUT 263 (IAC)), heard in May 2017, was still valid, namely that

“the violence in Libya has reached such a high level that substantial grounds are shown for believing that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person”.

49. It should be noted, however, that in the present case the applicant has not yet been deported, and that therefore a full and *ex nunc* evaluation is required (see paragraph 42 above). Accordingly, the Court is not called upon to take a stand on the above divergent assessments of the security situation at the relevant time. Instead, it will proceed to examine the security situation in Libya in the light of the present-day situation.

50. In this connection the Court notes that a ceasefire agreement was signed in Libya in October 2020, which is still in place (see paragraphs 25

and 26 above), resulting in a dramatic reduction in civilian casualties (see paragraph 25 above) and general improvements in the security situation, and opening access for displaced Libyans to return to their areas of origin. Thus, in the first half of 2021 nearly 65,000 displaced persons returned to Libya (see paragraph 28 above).

51. In addition, the mandate of the UN Support Mission in Libya (UNSMIL) has been extended to 31 October 2023 (see paragraph 26 above).

52. In view of the above, while recognising that violations of human rights and international humanitarian law have continued, and that the general situation in Libya remains serious and fragile, as it appears from the international sources referred to above (see paragraphs 23-33), the Court finds no reason to question the conclusion by the Swedish authorities and courts that the security situation in Libya is not such that there is a general need for international protection of Libyan nationals seeking asylum. In other words, it cannot be said that the general violence is so extreme, that there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see paragraph 43 above).

53. The Court will proceed to consider the applicant's individual circumstances.

54. The applicant, represented by legal counsel, was heard before two bodies, namely the Migration Agency and the Migration Court, and he submitted written observations before the Migration Court of Appeal, which denied him leave to appeal. The Migration Agency and the Migration Court noted in particular that he had originally applied in 2012 for asylum under a false identity, citing risks due to threats from the Libyan mafia as a reason for asylum. When reapplying for asylum in 2015, he stated that he was wanted by the regime in Libya, because he and his father had worked for the Gaddafi regime. The applicant's oral statements were vague, lacking in detail and coherence, and he did not submit any written evidence, except for a handwritten passport and various copies, of a rudimentary nature, allegedly of arrest warrants in respect of him. In conclusion, the Migration Agency and the Migration Court found that the applicant's asylum statements lacked credibility, and that he had failed to substantiate his alleged affiliation with the Gaddafi regime, the warrant for his arrest in Libya and accordingly his need for international protection. In the Court's view, the domestic authorities' conclusions in that respect were reached following a thorough examination containing rational grounds that it has no reason to doubt or depart from.

55. The above elements are sufficient for the Court to conclude that the applicant has failed to substantiate that he would be at risk of being killed or subjected to ill-treatment upon returning to Libya.

56. Accordingly, his removal would not be in violation of Article 2 and/or Article 3 of the Convention.

C. Rule 39 of the Rules of Court

57. The Court reiterates 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.

58. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 11 above) should remain in force until the present judgment becomes final.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that the applicant's removal would not be in violation of Article 2 of the Convention;
3. *Holds* that the applicant's removal would not be in violation of Article 3 of the Convention;
4. *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.

Done in English, and notified in writing on 13 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President