



## Swiss authorities failed to assess risks for gay man's return to the Gambia

The case [B and C v. Switzerland](#) (applications nos. 43987/16 and 889/19) concerned a homosexual couple, one of whom risked being returned to the Gambia following the rejection of his partner's application for family reunification. He alleged he was at risk of ill-treatment if returned.

In today's **Chamber** judgment<sup>1</sup> in the case the European Court of Human Rights held, unanimously, that there would be:

**a violation of Article 3** (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if the first applicant were deported to the Gambia on the basis of the domestic decisions in his case.

The Court considered that criminalisation of homosexual acts was not sufficient to render return contrary to the Convention. The Court found, however, that the Swiss authorities had failed to adequately assess the risk of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment from non-State actors. Several independent authorities noted that the Gambian authorities were unwilling to provide protection for LGBTI people.

The Court furthermore considered that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment became final.

### Principal facts

The applicants, Mr B and Mr C, are a Gambian and a Swiss national who were born in 1974 and 1948 respectively and lived in St Gall (Switzerland) together until the second applicant's death on 15 December 2019.

The first applicant had been in Switzerland since 2008. His application for asylum was rejected, as the authorities found his claims of previous ill-treatment not credible.

In 2014 the applicants registered their partnership. The second applicant lodged a request for family reunification in respect of the first applicant. The application was rejected. On appeal, the Office for Security and Justice of the Canton of St Gall ("the OSJ") denied Mr B the right to stay in Switzerland during the family-reunification proceedings. That decision was ultimately upheld by the Federal Supreme Court, which also noted his criminal record in the Canton of Lucerne and his time spent in prison. Mr B remained in Switzerland for the duration of the family-reunification proceedings, following the indication of an interim measure by the European Court.

Subsequently, the OSJ decision was upheld regarding family reunification. The Federal Supreme Court stated that the first applicant had a family network he could rely on in the Gambia, where the situation for homosexuals had improved. It did not believe that the first applicant's sexual orientation would come to the attention of the Gambian authorities or population. It furthermore noted that he was not well-integrated in Switzerland, and referred to his criminal record. It held that

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

there was a “major public interest” in the applicant’s leaving the country and that the interference with his rights was justified.

## Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman or degrading treatment) the first applicant complained that his return to the Gambia would expose him to the risk of ill-treatment. Relying on Article 8 (right to respect for private and family life) the first and second applicants complained that deportation would interfere with their family life.

The application was lodged with the European Court of Human Rights on 31 December 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul Lemmens (Belgium), *President*,  
Helen Keller (Switzerland),  
Dmitry Dedov (Russia),  
Georges Ravarani (Luxembourg),  
Darian Pavli (Albania),  
Anja Seibert-Fohr (Germany),  
Peeter Roosma (Estonia),

and also Milan Blaško, *Section Registrar*.

## Decision of the Court

The Court joined the applications. It ruled that there were no special circumstances requiring the examination of the second applicant’s application following his death.

### Article 3

The first applicant submitted that he had left the Gambia because of the active persecution of homosexuality, which was central to his identity. Homosexual acts remained illegal.

The Court reiterated that legislation prohibiting homosexual acts did not render removal to that country contrary to the Convention. It noted that it was not disputed that he was a homosexual, but agreed with the domestic courts that his claims of past ill-treatment were not credible.

It noted that the first applicant was still in Switzerland, and so the present-day situation in the Gambia had to be examined. It considered that a person’s sexual orientation formed a fundamental part of his or her identity and that no one should be obliged to conceal his or her sexual orientation in order to avoid persecution. The first applicant’s sexual orientation could be discovered if he were removed to the Gambia. The domestic authorities had held the contrary and furthermore had not assessed whether the Gambian authorities would be able and willing to provide the necessary protection to the first applicant against ill-treatment caused by his sexual orientation by non-State actors. The United Kingdom Home Office and the third-party intervenors, among others, stated that the Gambian authorities were currently unwilling to provide protection for LGBTI people in that State.

The court concluded that the Swiss courts had failed to sufficiently assess the risks of and State protection against ill-treatment from non-State actors, leading to a violation of the Convention.

### Article 8

The applicants claimed that the first applicant’s expulsion would disrupt their protected right to family life and that hiding his homosexuality would infringe his right to private life.

The first applicant acknowledged that the second applicant's death had changed those circumstances, but he nevertheless asserted that he wanted to continue to live in and visit the environment that he had shared with his former partner.

The Court considered that given, in particular, that the question of the physical separation of the two applicants was no longer pertinent, there was no need to give a separate ruling under this Article.

#### **Just satisfaction (Article 41)**

The Court held that Switzerland was to pay the applicant 14,500 euros (EUR) in respect of costs and expenses.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.