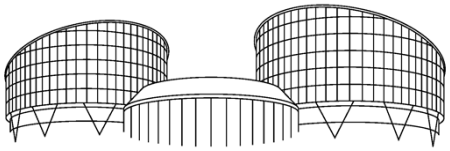

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF B AND C v. SWITZERLAND

(Applications nos. 889/19 and 43987/16)

JUDGMENT

Art 3 • Expulsion • Insufficient assessment of risk of and availability of State protection against ill-treatment on grounds of sexual orientation by non-State actors in Gambia • Applicant's homosexuality might be discovered by Gambian authorities or population if removed there • Risk of persecution in the form of individual acts by "rogue" officers and of ill-treatment from non-State actors • Gambian authorities' general unwillingness to provide protection to LGBTI persons • Deportation without a fresh assessment of these aspects would constitute a violation

STRASBOURG

17 November 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of B and C v. Switzerland,

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

Paul Lemmens, *President,*
Helen Keller,
Dmitry Dedov,
Georges Ravarani,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the applications (nos. 43987/16 and 889/19) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Gambian national, Mr B ("the first applicant"), and a Swiss national, Mr C ("the second applicant"), on 22 July 2016 and 31 December 2018, respectively;

the decision to give notice to the Swiss Government ("the Government") of the complaints concerning Articles 3 and 8 of the Convention;

the decision not to have the applicants' names disclosed (Rule 47 § 4 of the Rules of Court);

the decision to indicate an interim measure in respect of application no. 43987/16 to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with;

the decision to give priority to the applications (Rule 41 of the Rules of Court);

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the European Council of Refugees and Exiles (ECRE), the International Commission of Jurists (ICJ) and the AIRE Centre, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 13 October 2020,

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

INTRODUCTION

1. The case concerns the refusal of a residence permit for the first applicant on the basis of his registered same-sex partnership with the second applicant as well as the order that the first applicant be expelled. The applicants rely on Articles 3 and 8 of the Convention.

THE FACTS

2. The applicants were born in 1974 and 1948, respectively. They registered their same-sex partnership on 23 July 2014. They lived together until the second applicant's death on 15 December 2019. The first applicant continues to live in Switzerland. They were represented by Ms B. Surber, a lawyer practising in St. Gallen.

3. The Government were initially represented by their Agent at the time, Mr F. Schürmann, of the Federal Office of Justice, and subsequently by their Deputy Agent, Mr A. Scheidegger, of that same office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE FIRST APPLICANT'S ASYLUM APPLICATIONS

5. In 2008 the first applicant applied for asylum in Switzerland under a different identity and claiming to be from Mali. After his application was rejected and the removal order against him became final, he went missing and was thus not deported.

6. On 24 March 2013 the first applicant lodged a second asylum application, this time under his correct identity and claiming to be a national of both the Gambia and of Mali. He based that asylum application on his homosexual orientation and the situation of homosexuals in the Gambia. He claimed to have had covert relations with different men there. In 2008, he had been caught performing a sexual act in a hotel and had been arrested by the police. He feared criminal prosecution and being sentenced to fourteen years' imprisonment. He managed to escape during his transfer to prison and left the country immediately. Some two years ago, he met his partner, C, in Switzerland.

7. On 20 February 2014 the (then) Federal Migration Office rejected the asylum application and ordered the first applicant to leave Switzerland.

8. On 12 December 2014 the Federal Administrative Court rejected the first applicant's appeal in so far as it concerned his request for asylum. It concurred with the Federal Migration Office that the first applicant's account was not credible. It considered, *inter alia*, that he had invoked entirely different identities and claims in his two asylum applications. In his written second asylum application he had mentioned risks if his sexual orientation became known in the Gambia, and only referred to the incident in the hotel during the oral hearing. He presented a Gambian passport with a scan of his signature issued in Banjul in 2012, which his sister had allegedly obtained for him. It was not plausible that the authorities would have issued him with a passport while criminal proceedings had been pending against him. In sum, the first applicant had not substantiated that he had been persecuted, or been at risk of persecution, at the time he left the Gambia.

9. The Federal Administrative Court went on to find that the first applicant was also not entitled to refugee status based on the registration of his partnership with the second applicant. There was no indication that the Gambian authorities had been aware of his sexual orientation at the time he left the country. The Swiss authorities did not inform them of the registration of the partnership. Nor were there any indications that the first applicant had made his sexual orientation public or been in close contact with same-sex groups and organisations in Switzerland. While the situation for homosexuals was difficult in the Gambia, homosexual orientation was not in itself sufficient to make a person qualify for refugee status. Asylum-seekers had to evince a concrete risk of ill-treatment, and the first applicant had failed to do so.

10. In so far as the appeal concerned his removal, the Federal Administrative Court found that the latter had become devoid of purpose: the Federal Migration Office had in the meantime set aside the removal order in view of the family reunification proceedings lodged and pending before the cantonal authorities, which had jurisdiction to rule on the first applicant's removal (see paragraphs 14-15 below).

11. On 4 May 2015 the first applicant lodged a third asylum application, pointing to the deterioration of the situation of homosexuals in Gambia since the adjudication of his previous application. Moreover, he was afraid that his family, who was aware of his sexual orientation, would denounce him. The State Secretariat for Migration rejected the application on 14 August 2015.

12. On 16 November 2016 the Federal Administrative Court dismissed the first applicant's appeal in so far as it concerned the refusal of asylum. It found credible that he was homosexual. It did not find credible, by contrast, his account as regards his family, which was full of contradictions. In the first asylum proceedings he had claimed that his parents had died when he was a small child and that he had two sisters, who lived in Mali and the Ivory Coast. In the second asylum proceedings he had claimed that his father had died in 2010 and that he had only one sister, who lived with his mother in the Gambia. In the third asylum proceedings he claimed to have several brothers and further family members in the Gambia. Moreover, in the second asylum proceedings he had claimed that he had never had any problems in the Gambia other than the incident at the hotel. In the third asylum proceedings he claimed to have been ill-treated and ostracised by his family. It did not seem credible that the second applicant would support the first applicant's family with monthly money transfers if the family situation was the way it was now alleged to be.

13. The Federal Administrative Court endorsed the assessment of the State Secretariat for Migration that the first applicant had not revealed any information, either in Switzerland or in the Gambia, potentially apprising the Gambian authorities of his homosexuality. It was not convinced that the

Gambian authorities would deduce from the second applicant's money transfers and their shared address that they were in a same-sex relationship. Moreover, the first applicant had claimed that he would not talk about his relationship when he spoke to his relatives in the Gambia. Nor had he been in close contact with same-sex groups or organisations. In conclusion, no assessment was required of the situation of homosexuals in the Gambia. Lastly, the determination whether the first applicant should be allowed to remain in Switzerland or should be removed, fell within the competence of the cantonal authorities.

II. THE PROCEEDINGS CONCERNING FAMILY REUNIFICATION

14. On 12 August 2014 the second applicant lodged a request for family reunification, that is, for a residence permit to be granted to the first applicant in view of their registered partnership (see paragraph 2 above).

15. On 10 February 2015 the migration office of St. Gallen Canton denied that request, having regard to the first applicant's criminal record and conduct. It ordered the first applicant to leave the country, adding that he would have to await the outcome of the appeal proceedings from abroad.

16. On the second applicant's appeal of 21 February 2015, the proceedings were split into two sets: one concerning the question whether or not the first applicant would be allowed to remain in Switzerland during the family reunification proceedings (leading to application no. 43987/16) and one concerning the merits of those proceedings, that is, the question whether or not to grant a residence permit to the first applicant (leading to application no. 889/19).

A. The proceedings leading to application no. 43987/16

17. On 4 March 2015 the Office for Security and Justice of St. Gallen Canton rejected the appeal in so far as it concerned allowing the first applicant to remain in Switzerland during the family reunification proceedings.

18. On 7 May 2015 the Administrative Court of St. Gallen Canton rejected the appeal against that decision. It considered that the first applicant did, in principle, have a right to reside with the second applicant on the basis of their registered partnership. Having regard to the circumstances of the case, however, it was not evident, from a summary assessment, that the prospects of the first applicant being granted residency considerably outweighed those of him being denied residency. Therefore, the court denied him the right to remain in Switzerland for the duration of the family reunification proceedings (see section 17 (2) of the Aliens Act, paragraph 34 below).

19. On 23 December 2015 the Federal Supreme Court upheld that decision. It noted that the first applicant was a repeat offender and had also given reason for complaint otherwise. On 21 December 2012, the Lucerne Criminal Court had convicted him, *inter alia*, of attempted extortion with violence, property damage and unlawful entry into and presence in Switzerland, and sentenced him to 18 months' imprisonment. This was a ground for expiry of his right to a residence permit within the meaning of section 51 (b) in conjunction with sections 63 (1) (a) and 62 (b) of the Aliens Act (see paragraph 34 below). As the first applicant had served time in prison, the applicants had only occasionally been able to live together. They could maintain their relationship by way of visits and modern forms of electronic communication, at least for the duration of the family reunification proceedings. Requiring the first applicant to await the outcome of these proceedings from abroad did not infringe Article 8 of the Convention.

20. Nor would requiring the first applicant to leave Switzerland temporarily give rise to a breach of Articles 2 or 3 of the Convention. He had claimed to be a citizen of both the Gambia and Mali and could thus also relocate to Mali; he had not claimed that he would face a real risk of treatment contrary to Article 3 of the Convention there. Acknowledging that the situation of homosexuals in the Gambia was difficult, the Federal Supreme Court reproduced the key considerations of the Federal Administrative Court's judgment of 12 December 2014 (see paragraphs 8 and 9 above), adding that it appeared that the first applicant had a sister in the Gambia, with whom he could stay temporarily.

21. The first applicant challenged that decision in application no. 43987/16. On 2 August 2016 the duty judge granted his request for interim measures under Rule 39 of the Rules of Court and indicated to Switzerland not to deport the first applicant for the duration of the proceedings before it. Notice of the application was given to the Government exclusively in respect of the first applicant's complaint under Article 3 of the Convention.

22. In their observations of 2017, the Government argued that the complaint under Article 3 was manifestly ill-founded and invited the Court to declare the application inadmissible. In the event that the Court did not share their view, they asked the Court to suspend the processing of the application until the conclusion of the domestic proceedings concerning family reunification and the first applicant's right to reside in Switzerland.

B. The proceedings leading to application no. 889/19

23. On 7 March 2016 the Office for Security and Justice of St. Gallen Canton rejected the appeal of 21 February 2015 (see paragraph 16 above).

24. The Administrative Court of St. Gallen Canton upheld that decision on 22 November 2017.

25. In their appeal to the Federal Supreme Court, the applicants asserted that the first applicant's removal to the Gambia was barred by Article 3 of the Convention in view of the ill-treatment he would face there on account of his homosexuality. In the alternative, they submitted that the refusal of a residence permit breached Article 8 of the Convention. They referred to the second applicant's severe illness, his inability to relocate to the Gambia as well as to the situation for homosexuals there.

26. On 5 July 2018 the Federal Supreme Court rejected the applicants' appeal. The first applicant was not entitled to a residence permit on the basis of his registered partnership, as the conditions of either ground of Article 63 § 1 of the Aliens Act were met (section 51 (1) (b) Aliens Act, see paragraph 34 below): he had been sentenced to 18 months' imprisonment (see paragraph 19 above) and had shown a high aggression potential with a tendency towards violence on other occasions, including while he was in detention, and after the registration of his partnership with the second applicant and his release from prison. There was a major public interest in the first applicant leaving the country.

27. Expelling the first applicant would be a justified interference with the right to respect for private and family life under Article 8 of the Convention. He had arrived in Switzerland in 2008 at the age of 34. He had spent most of his life, and in particular his formative years, in the Gambia and in Mali and was well acquainted with the mores and traditions there. His statements in respect of his family were contradictory but, in any event, he had a family network on which he could rely on return. It was not credible that his family had disowned him, given that his sister had allegedly obtained the documents for the registration of his partnership for him. It appeared that the second applicant was also supporting the first applicant's family financially. Since the Gambian documents had been issued in 2012 and contained a scanned signature, it was probable that the first applicant had been in Gambia himself at the time and that the authorities had seen no reason to take action against him. He was poorly integrated in Switzerland, despite having been there for almost ten years, and only recently participated in a German course at beginners' level. He had closer social, cultural and family ties to his country of origin than to Switzerland, where his ties were limited to his partner, the second applicant. It was thus reasonable for the first applicant to return to his country of origin.

28. The Federal Supreme Court noted that the second applicant suffered from incurable cancer. He was dependent on medical treatment in the medium and long term. In view of his state of health it was not possible for him to enjoy his relationship with the first applicant in the Gambia. However, the applicants could maintain their relationship through visits and

the use of modern electronic communication. Moreover, the first applicant might be allowed to reside in Switzerland at a later stage, provided his conduct abroad was without reproach. In so far as the second applicant required care and support, his sons and grandchildren could provide it; the first applicant's permanent presence was not mandatory to that end. The applicants had so far been able to enjoy their registered partnership only occasionally, as the first applicant had served time in prison. In view of the second applicant's financial means, it was possible for the first applicant to travel to Switzerland regularly, even if he had to obtain a visa each time. Having regard to the criminal offences committed by the first applicant, the applicants could not have expected to live together in Switzerland at the time they registered their partnership. Balancing the competing interests, the Federal Supreme Court found that the public interest in excluding the first applicant from Switzerland outweighed the applicants' interest in being able permanently to enjoy their relationship in Switzerland.

29. The human rights situation in the Gambia was not without problems. According to different reports, homosexuals had been persecuted and at times tortured by military or police units prior to the change of government in December 2016. However, while laws criminalising homosexual conduct and providing for at least fourteen years' imprisonment remained in force, they were no longer applied following the change of government. The new President had declared that homosexuality was not an issue for him, and the media reported that he considered it a personal matter. One of his ministers was reported as saying that the President believed that Gambians had the right to any sexual orientation. In sum, the situation for homosexuals had improved.

30. The Federal Supreme Court considered that the Federal Administrative Court, in its judgment of 12 December 2014 (see paragraphs 8-9 above), had found that there was no reason to assume that the Gambian authorities had known of the first applicant's sexual orientation at the time he left the Gambia and that there were no indications that they had since learned about the registration of his partnership. It reproduced that judgment's key considerations and observed that that court reached the same conclusion in the proceedings concerning the third asylum application (see paragraph 13 above). Having regard to the transition in the Gambia and to the contradictions in the first applicant's account as established by the Federal Administrative Court in the asylum proceedings, the Federal Supreme Court concluded that he had not shown substantial grounds for believing that he faced a real risk of ill-treatment contrary to Article 3 of the Convention if he were removed to the Gambia. Since the second applicant lived in Switzerland and the first applicant could enjoy his relationship with him through visits to Switzerland, presumably no homosexual acts capable of drawing the attention of the population or of the authorities to the first applicant would occur in the Gambia.

III. SUBSEQUENT DEVELOPMENTS

31. By letter of 3 October 2019 the authorities were informed that the second applicant's state of health had significantly deteriorated. According to a medical certificate of the St. Gallen Cantonal Hospital, he was being treated with palliative chemotherapy and the remaining life expectancy was limited. Further deteriorations were to be expected in the following weeks and months and in this situation the first applicant's support was essential.

32. By letter of 27 November 2019 the migration office of St. Gallen Canton confirmed that the state of health of the second applicant would be taken into account, if necessary, when determining the date of removal of the first applicant; he did not have to leave Switzerland as long as the second applicant required his support.

33. The second applicant died on 15 December 2019. Both the Government and counsel for the applicants informed the Court of the death, by letters of 19 December 2019 and 2 January 2020, respectively.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

34. The relevant provisions of the Aliens Act, in so far as relevant, provide as follows:

section 17 – Regulation of the period of stay until the permit decision

"(1) Foreign nationals who have entered the country lawfully for a temporary period of stay and who subsequently apply for longer period of stay must wait for the decision abroad.

(2) If the admission requirements are evidently fulfilled, the competent cantonal authority may permit the applicant to remain in Switzerland during the procedure."

section 42 – Family members of Swiss nationals

"(1) The foreign spouse and unmarried children under the age of 18 of a Swiss national who live with the Swiss national are entitled to be granted a residence permit and to have their residence permit extended.

..."

section 51 – Expiry of the right to family reunification

"(1) The rights in terms of Article 42 expire if:

...

b. there are grounds for revocation in terms of Article 63.

..."

section 52 – Registered partnership

"The provisions of this Chapter on foreign spouses apply *mutatis mutandis* to registered partnerships of same-sex couples."

section 62 – Revocation of permits and other rulings

"(1) The competent authority may revoke permits, with the exception of the permanent residence permit, and other rulings under this Act if the foreign national:

...

b. has been given a long custodial sentence or has been made subject to a criminal measure in terms of Articles 59–61 or 64 of the SCC;

..."

section 63 – Revocation of the permanent residence permit

"(1) The permanent residence permit may be revoked only if:

a. the requirements of Article 62 letter a or b are fulfilled;

b. the foreign national has seriously violated or represents a threat to public security and order in Switzerland or abroad or represents a threat to internal or external security;

..."

II. RELEVANT CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

35. Joined cases *X, Y and Z v Minister voor Immigratie en Asiel* (Joined Cases C-199/12 - C-201/12, judgment of 7 November 2013) concerned asylum-seekers, who claimed that they had reason to fear persecution in their respective countries of origin – Sierra Leone, Uganda and Senegal – on account of their homosexuality, which was a criminal offence in those countries. It had not been shown that they had already been persecuted or been subject to direct threats of persecution in the past. In its conclusions, the CJEU held:

"Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."

III. RELEVANT GUIDELINES FROM THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

36. On 23 August 2012 UNHCR issued the "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (HCR/GIP/12/09). They state, *inter alia*, the following (footnotes omitted):

> "**Laws criminalizing same-sex relations**
>
> 26. Many lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms. Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.
>
> 27. Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.
>
> 28. Assessing the 'well-founded fear of being persecuted' in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined. The 'fear' element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI [lesbian, gay, bisexual, transgender and intersex] persons are nevertheless being persecuted. ...
>
> **Concealment of sexual orientation and/or gender identity**
>
> 30. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion.
>
> 31. That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in

order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others.

32. With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children ...). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term.

Agents of Persecution

34. There is scope within the refugee definition to recognize persecution emanating from both State and non-State actors. State persecution may be perpetrated, for example, through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military. Individual acts of "rogue" officers may still be considered as State persecution, especially where the officer is a member of the police and other agencies that purport to protect people.

35. In situations where the threat of harm is from non-State actors, persecution is established where the State is unable or unwilling to provide protection against such harm. Non-State actors, including family members, neighbours, or the broader community, may be either directly or indirectly involved in persecutory acts, including intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence. In some countries, armed or violent groups, such as paramilitary and rebel groups, as well as criminal gangs and vigilantes, may target LGBTI individuals specifically.

36. In scenarios involving non-State agents of persecution, State protection from the claimed fear has to be available and effective. State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence. Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect

that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant. As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return.

37. Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity. The existence of certain elements, such as anti-discrimination laws or presence of LGBTI organizations and events, do not necessarily undermine the well-foundedness of the applicant's fear. Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws. A *de facto*, not merely *de jure*, change is required and an analysis of the circumstances of each particular case is essential. ..."

IV. RELEVANT COUNTRY INFORMATION ON THE SITUATION OF HOMOSEXUALS IN THE GAMBIA

37. In its Concluding Observations of 30 August 2018 (CCPR/C/GMB/CO/2), the United Nations Human Rights Committee expressed concern that consensual same-sex relationships were criminalised and that lesbian, gay, bisexual, transgender and intersex persons reportedly continue to be subject to arbitrary arrest and violence. It stated that the Gambia should decriminalise same-sex relationships between consenting adults and take measures to change societal perception of lesbian, gay, bisexual, transgender and intersex persons and protect them from arbitrary arrests and violence.

38. Several stakeholders in the Universal Periodic Review process stated that lesbian, gay, bisexual, transgender and intersex persons continue to face discriminatory laws, stigma and harassment and that the legislation criminalising same-sex relations and the social stigma created a climate of fear that translated into persons being forced to stay in the closet, and bread a climate of extortion, corruption and further abuse of LGBTI persons (see the Summary of Stakeholders' submissions on the Gambia, Working Group on the Universal Periodic Review of the United Nations Human Rights Council, A/HRC/WG.6/34/GMB/3, 16 August 2019, at paragraphs 20-21).

39. The United Kingdom Home Office's country information and guidance note "The Gambia: Sexual orientation and gender identity or expression" of August 2019, which analysed and assessed publicly available information, stated, *inter alia*, the following (footnotes omitted):

"2.4 Assessment of risk

...

b. State treatment of LGBTI persons

...

2.4.6 The continued criminalisation of same-sex relations means that the arrest, detention and prosecution of LGBTI persons remains a possibility. However, since president Jammeh was ousted from power in December 2016, there have been no reported prosecutions or arrests of LGBTI persons in the sources consulted ...

d. Societal treatment of LGBTI persons

2.4.8 The Gambia is a culturally and religiously conservative country, and sources indicate that there is strong societal intolerance of and discrimination against LGBTI persons. Anti-LGBTI rhetoric by the previous former president Jammeh, prior to his ousting from power in December 2016, in particular, played on and may have magnified existing societal homophobia ...

e. Conclusion

2.4.11 There have been improvements in the general human rights environment since the former President Yammeh was ousted in December 2016. However, consensual same-sex sexual activity for both men and women remains illegal. The new government has stated that LGBTI persons would not be prosecuted - and there are no recent reports of arrests and prosecutions. However, LGBTI persons who openly express their sexual orientation and/or gender identity/expression may face discrimination from state actors. Additionally, LGBTI persons who openly express their orientation / identities are likely to face strong societal disapproval and discrimination. If a person who is LGBTI does not live openly due to the fear of persecution that would follow if they did, then they are also a refugee.

2.4.12 In general, LGBTI persons are likely to face discrimination from state and societal actors which, by its nature and repetition, is likely to amount to persecution. Each case, however, needs to be considered on its facts, with the onus on the person to demonstrate that they face such a risk ...

2.5 Protection

...

2.5.2 Where the person has a well-founded fear of persecution from non-state actors, the state is generally able but unwilling to provide effective protection. As same-sex sexual acts are prohibited in The Gambia, it would be unreasonable to expect a person identifying as LGBTI, who fears persecution or serious harm by non-state actors, to seek protection from the authorities without themselves facing a risk of prosecution.

2.5.3 However, decision makers must consider each case on its facts. A person's reluctance to seek protection does not necessarily mean that effective protection is not available. The onus is on the person to demonstrate why they would not be able to seek and obtain state protection ...

3. Legal context

3.1 The Gambian Criminal Code

3.1.1 The Gambian Criminal Code under articles 144, 145 and 147 state that same-sex relations for men and women are illegal and are punishable by between 5 and 14 years in prison ...

3.2 October 2014 amendments to section 144 of criminal code

3.2.1 In 2014 an amendment (144A) was approved by Parliament, this inserted the crime of 'aggravated homosexuality' which is punishable to life imprisonment ...

4. Political context

... The Congressional Research Service (CRS) report – Gambia reported in June 2019 that:

'The Gambia [...] underwent a historic transition of power after longtime authoritarian leader Yahya Jammeh unexpectedly lost an election in December 2016. ...

During Jammeh's tenure, annual State Department human rights reports documented widespread abuses against citizens, including torture, arbitrary arrest, enforced disappearances, and indefinite detention. The regime targeted journalists, dissidents, and other critics. The international community expressed particular concern over discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons, including laws criminalizing homosexuality and abuses against individuals arrested on suspicion of being gay. [...] President Barrow has overseen a substantial opening of political and social space. Journalists have returned from exile, and private media have burgeoned. Human rights challenges persist, however, including episodic abuses by security forces, harsh prison conditions, and trafficking in persons. Repressive Jammeh-era laws remain in effect, including the anti-LGBT law ...

Freedom House in report covering 2018 noted:

'... The 2016 election resulted in a surprise victory for opposition candidate Adama Barrow. Fundamental freedoms including the rights of assembly, association, and speech improved thereafter, but the rule of law is unconsolidated, LGBT (lesbian, gay, bisexual, and transgender) people face severe discrimination, and violence against women remains a serious problem.'

5. State attitudes and treatment

5.1 Government attitude

5.1.1 Human Rights Watch (HRW): World Report 2018 - Gambia, 18 January 2018 and referring to events in 2017 noted that:

'The human rights climate in Gambia improved dramatically as the new president, Adama Barrow, and his government took steps to reverse former President Yahya Jammeh's legacy of authoritarian and abusive rule. [...] President Barrow's government has promised not to prosecute same-sex couples for consensual sexual acts, which sharply contrasted with Jammeh's hate-filled rhetoric toward lesbian, gay, bisexual, and transgender (LGBT) persons. However, the government has not repealed laws that criminalize same-sex conduct, including an October 2014 law that imposes sentences of up to life in prison for "aggravated homosexuality" offenses.'

5.1.2 However, HRW noted its Country Profiles: Sexual Orientation and Gender Identity (SOGI) webpage, in entry dated 23 June 2017 on Gambia that: '[...] The criminalization of same-sex conduct leaves lesbian, gay, bisexual, and transgender (LGBT) Gambians at risk of arbitrary arrest and detention, although fewer arrests and physical abuse of LGBT Gambians were reported in 2016 [and prior to President Jammeh's ousting].'

5.1.3 The USSD Human Rights report for 2018 stated: 'Citing more pressing priorities, President Barrow dismissed homosexuality as a nonissue in the country. On

July 5 [2018], the country's delegation to the UN Human Rights Council stated that the government had no immediate plans to reverse or change the law. The law, however, was not enforced ...

5.1.5 [In July 2018 the United Nations Human Rights Committee] noted the following comments made by the Gambian delegation following examination by the committee:

'There had not been any prosecutions or convictions of lesbian, gay, bisexual, transgender and intersex persons, the delegation confirmed, and explained that this community was not at risk in the Gambia. The law against homosexuality was still in place, but the Government had committed to not using it to prosecute. People had to have a say in the repeal of this law, the delegate said; it was a delicate process that had to be carefully managed as the State wished to avoid any harm to the lesbian, gay, bisexual, transgender and intersex community. There were religious and cultural aspects in the Gambia that made decriminalization of homosexuality a difficult issue.'

...

5.2 Arrests, prosecutions and detention

5.2.1 USSD Human Rights report for 2018 and 2017 made no reference to any arrests of LGBTI persons ...

5.2.3 CPIT was not able to find information on any specific arrests and detention of LGBTI persons or prosecutions since the official change of government in 2017 ... in the sources consulted (see Bibliography).

5.3 Police violence

5.3.1 At the time of compiling the response, and within time and resourcing constraints, CPIT was not able to find information on any specific arrests and detention of LGBTI persons or prosecutions since the official change of government in 2017 (see Constitution) in the sources consulted (see Bibliography). However, this does not mean to say there have been no further instances of arrests and detentions of LGBTI persons.

6. Societal attitudes and treatment

6.1 Societal norms and public opinion

6.1.1 The US State Department (USSD) Country Report on Human Rights Practices 2018 - Gambia, stated: 'There was strong societal discrimination against lesbian, gay, bisexual, transgender, and intersex individuals.' While the FH report also covering events in 2018 observed that LGBTI persons 'face severe societal discrimination'[.]

6.1.2 Amnesty International – Gambia 2017/2018 stated that: 'Same-sex relations remained criminalized. [...] LGBTI people continued to suffer discrimination and threats from non-state actors.'

6.1.3 An online Mail&Guardian Africa article, 15 March 2019, noted that there was no protest to President Jammeh's opposition to LGBT rights in 2014 and that still few are willing to speak out. Madi Jobarteh the Gambia country representative for the Westminster Foundation for Democracy said: "That [speaking out] would be a very significant decision given the cultural setting and people's perception and understanding of LGBT issues"'.

6.1.4 The article goes on to observe that:

'Unlike other countries such as Uganda and Nigeria, where LGBT communities exist and advocate for themselves despite widespread persecution, there is no such civil society in Gambia. It is too dangerous.

'This means someone very brave will have to come forward if the commission is to hear evidence of Jammeh's LGBT abuses and record them into public memory.

'If word got out that an activist or LGBT Gambian planned to raise such issues before the commission, Jobarteh said he would be concerned for their safety.

'Musu Bakoto Sawo, the commission's deputy executive secretary, acknowledges "there is a high probability of victims not coming out."

'The result is that LGBT Gambians may be the one group whose experience with persecution goes unrecorded. Put another way, they may be the one group whose rights do not improve in the post-Jammeh era.

'"For a long time the situation will remain as it is. Gambians generally are not going to take LGBT issues easily," Jobarteh said.' ..."

THE LAW

I. JOINDER OF THE APPLICATIONS

40. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. DEATH OF THE SECOND APPLICANT

41. Following the death of the second applicant on 15 December 2019, of which both parties informed the Court (see paragraph 33 above), the Court notes that no heir or close relative has shown an interest in pursuing his part of application no. 889/19.

42. In accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of application no. 889/19 in respect of the second applicant. It is therefore appropriate to strike that application out of the list in so far as the second applicant is concerned (Article 37 § 1 (c) of the Convention).

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The first applicant complained under Article 3 of the Convention that on his return to the Gambia he will run a real risk of ill-treatment due to his sexual orientation. Article 3 of the Convention reads as follows:

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

A. Admissibility

44. The Court notes that this complaint 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

(a) The first applicant

45. The first applicant submitted that he had left the Gambia in 2008 because homosexuals were persecuted under the then-President Jammeh. He had not been there since and had obtained his passport in 2012 with the help of his sister who lived there and to whom he had sent the necessary documents with his signature. For many years homosexual acts had been criminalised in the Gambia, with sanctions of up to fourteen years' imprisonment. In 2014, legislation was amended to provide for life imprisonment in case of aggravated acts. Under the previous President Jammeh, the authorities targeted (suspected) LGBTI persons, and the long-standing campaign of hatred and persecution promoted discrimination and violence against homosexuals. The situation of homosexuals had not improved significantly following the change of government in late 2016, early 2017. The new President Barrow no longer stirred up hatred against homosexuals, but had not displayed any interest in becoming active in the positive sense of protecting homosexuals. The laws criminalising homosexual acts remained in force and could be applied any time. He was thus at risk of ill-treatment at the hands of the authorities.

46. In view of the continued criminalisation of homosexual acts, the population maintained the conviction that homosexuality was something forbidden. There was a homophobic climate and no change in attitude in the population. Even assuming that the authorities no longer persecuted homosexuals, they were still far from willing and able to protect them against attacks from private individuals. The Swiss authorities essentially based their conclusion that he did not face a real risk of ill-treatment on the consideration that his sexual orientation was not known in the Gambia and that he could avoid ill-treatment by suppressing and hiding his sexual orientation. Yet, as his sexual orientation was a fundamental part of his identity, he could not be obliged to conceal it in order to avoid persecution (relying on *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017). Moreover, his mother and his sister knew about his sexual orientation and it was possible that his sexual orientation became, or was already, known more widely in the Gambia. He referred to a phone call with a bank employee who had inquired, in view of the regular money transfers which the late second applicant had made to the first applicant's account in

the Gambia, about the relationship in which the applicants stood to each other, indicating a suspicion in respect of the first applicant's sexual orientation.

47. In the Gambia, there was a real risk that he would be subject to discrimination and ill-treatment by non-State actors based on his sexual orientation owing to the hatred that had been stirred up for years, with no State protection available to him. He relied on a judgement of the Austrian Federal Administrative Court of June 2017, in which such a finding had been made in a comparable case. The examining authorities were obliged to investigate *proprio motu* whether the authorities in the country of origin guaranteed protection against ill-treatment at the hands of non-State actors (*J.K. and Others v. Sweden* [GC], no. 59166/12, § 98, 23 August 2016), but had not done so in the present case, despite his submissions on that matter. This fell short of the procedural requirements under Article 3.

(b) The Government

48. The Government observed that before the Court, the first applicant explained his departure from the Gambia by the general situation to which homosexuals were exposed in that country at the time. He no longer claimed to have been arrested for same-sex sexual acts there, contrary to his claims at the domestic level, which had been found not to be credible (as had been other claims concerning his personal situation, such as his family relations). It did not appear that he had suffered past persecution in the Gambia. Nor was there reason to believe that the authorities had known of his homosexuality before his departure. Similarly, there was nothing to indicate that the Gambian authorities were aware of his relationship with the late second applicant. It did not appear that he had maintained close contacts with LGBTI organisations or groups there. In the event of a return, he would therefore not be exposed to particular attention from the authorities. Moreover, he had managed to obtain a passport from the Gambian authorities in 2012. This and other parts of his account such as interactions with a bank employee may suggest that he had in fact visited the country after his departure.

49. The overall human rights situation in the Gambia had significantly improved following the change of government in late 2016 and early 2017. Although the provisions criminalising same-sex sexual acts had not been repealed, the available information clearly indicated that they were not applied in practice. Their mere existence would not render the first applicant's removal contrary to Article 3 of the Convention (referring to *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004). It was true that the first applicant could not be obliged to conceal his sexual orientation in order to avoid persecution (*I.K. v. Switzerland*, cited above). The Federal Supreme Court had taken that case-law into account even if it had not expressly reproduced it.

50. The Government acknowledged that the possibility that the first applicant might be exposed to certain discriminatory attitudes from private persons could not be excluded. However, in view of the tolerance expressed by the new government towards sexual minorities and its general efforts to achieve a better human rights record, it could be expected that he would be able to obtain protection from the authorities. Furthermore, in view of the financial means available to him, he would not have to work in the Gambia and had a large margin of manoeuvre in respect of his living conditions. He would thus be able to protect himself from discriminatory behaviour against him. In sum, any disadvantages which the first applicant might face in the event of return to the Gambia did not meet the threshold of Article 3 of the Convention. The Government also referred to judgments of the Administrative Court in Freiburg im Breisgau, Germany, of March 2018 and June 2019 which had deemed past persecution to be necessary for an individual to be at a real risk of ill-treatment contrary to Article 3 of the Convention upon return.

(c) The third parties

51. In application no. 43987/16, the International Commission of Jurists (ICJ), the European Council of Refugees and Exiles (ECRE), the AIRE Centre and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) made a joint submission. ILGA-Europe, ECRE and the ICJ also subsequently made a joint submission in application no. 889/19.

52. The interveners argued that the existence of laws criminalising consensual same-sex sexual conduct disclosed dispositive evidence of a real risk of treatment contrary to Article 3 of the Convention and triggered *non-refoulement* obligations. Laws criminalising same-sex relationships, even if not routinely implemented, essentially required concealment of same-sex sexual orientation, as they could be used against an individual at any time. Coerced concealment constituted pain and suffering amounting to treatment proscribed under Article 3, even if it was temporary. Requiring coerced, including self-enforced, concealment of a person's homosexual orientation – as a way, purportedly, to mitigate the real risk of their being exposed to treatment contrary to Article 3 – was incompatible with Convention obligations, and removing persons based on the expectation that they conceal their sexual orientation on return would breach Article 3.

53. As regards the risk of ill-treatment in the Gambia based on homosexual orientation, the interveners submitted that LGBTI individuals have suffered and continued to suffer acts of persecution, including torture, other ill-treatment, and arbitrary and discriminatory prosecution and disproportionate punishment. The existence of laws criminalising consensual homosexual conduct enabled, encouraged and contributed to the persecutory environment and exposed LGBTI individuals to real risks of

persecutory harm. There was also evidence of a lack of willingness or ability on the part of the authorities to effectively protect LGBTI persons from discrimination and homophobic acts and to prosecute such acts. Since the change of Government, the danger of so-called "self-justice" had increased because there was no longer any guarantee that the authorities would pursue LGBTI cases, and so there was a danger that families, neighbours and religious leaders would simply make LGBTI people "disappear".

2. The Court's assessment

54. The relevant general principles were summarised by the Court in *J.K. and Others v. Sweden* (cited above, §§ 77-105).

55. Since the first applicant has not yet been deported, the question of whether he would face a real risk of being subjected to ill-treatment contrary to Article 3 of the Convention upon his return to the Gambia must be examined in the light of the present-day situation (see ibid., § 83).

56. The available reports indicate a considerable improvement in the human rights situation in the Gambia following the change of government in late 2016 and early 2017. The Court considers that the general human rights situation is not such as to prevent the deportation of any Gambian national *per se*. Hence, it must assess whether the first applicant's personal circumstances are such that he would face a real risk of treatment contrary to Article 3 of the Convention if he were deported to the Gambia.

57. It is not disputed between the parties that the first applicant is homosexual. They also agree that a person's sexual orientation forms a fundamental part of his or her identity and that no one may be obliged to conceal his or her sexual orientation in order to avoid persecution (see *I.K. v. Switzerland*, cited above, § 24). Against this background and irrespective of whether or not the first applicant's sexual orientation was at present known to the Gambian authorities or population, the Court considers it may subsequently be discovered if he were removed there (see also paragraph 36 above, at § 32). That was the case at the time of the domestic authorities' assessment, just as it is now, following the second applicant's death, which may induce the first applicant to find a new partner. The Court disagrees with the domestic authorities' assessment that the first applicant's sexual orientation would presumably not come to the attention of the Gambian authorities or population (see paragraph 30 above).

58. The first applicant's claim of past persecution was dismissed as not credible in the domestic proceedings (see paragraphs 8 and 12 above). The Court does not see a reason to depart from that assessment of the domestic authorities, which are best placed to assess the credibility of an individual since it is they who have had an opportunity to see, hear and assess his or her demeanour (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, § 118, 23 March 2016). In any event, before the Court he does not claim to

have suffered persecution in the past in the Gambia. The issue of past ill-treatment as an indication for a real risk of ill-treatment in the future thus does not arise (contrast *J.K. and Others v. Sweden*, cited above).

59. In so far as the applicant alleges a risk of ill-treatment at the hands of the authorities, the Court observes that homosexual acts remain criminalised in Gambian legislation and carry severe prison sentences. Reports – and the parties' submissions – indicate that prosecutions of LGTBI persons based on these laws no longer occur under President Barrow. The Court takes the view, consistent with *I.I.N. v. the Netherlands* (cited above) and the case-law of the CJEU (see paragraph 35 above), that the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal to that country contrary to Article 3 of the Convention. What is decisive is whether there is a real risk that these laws are applied in practice, which is reported not to be the case in the Gambia at present. Persecution relating to sexual orientation and gender identity by State actors may also take the form of individual acts of "rogue" officers (see paragraph 36 above, at § 34). While no such acts are reported in the recent country reports on the Gambia, the United Kingdom Home Office indicated that this may be due to under-reporting (see paragraph 39 above, at 5.3.1) and that LGBTI persons openly expressing their sexual orientation and/or gender identity are likely to face discrimination from State actors (ibid., at 2.4.11 and 2.4.12).

60. The first applicant further alleges that he would face a real risk of ill-treatment at the hands of non-State actors. The domestic authorities found not credible his account in respect of his family in view of his contradictory statements and concluded that he did not run a risk of ill-treatment at their hands (see paragraphs 12 and 30 above). The Court does not discern any reason to depart from that assessment.

61. Yet, ill-treatment may also emanate from non-State actors other than family members (see paragraph 36 above, at § 35). Reports indicate widespread homophobia and discrimination against LGBTI persons following years of hatred stirred up by the former President Jammeh (see paragraph 39 above, at 2.4 and 6). The third-party interveners submitted that such dangers had in fact increased following the change of government (see paragraph 53 above).

62. A related question is whether the Gambian authorities would be able and willing to provide the necessary protection to the first applicant against ill-treatment on grounds of his sexual orientation emanating from non-State actors. The availability of such State protection had to be established by the Swiss authorities *proprio motu* (see *J.K. and Others v. Sweden*, cited above, § 98). However, having taken the view that it was not likely that his sexual orientation would come to the attention of the Gambian authorities or population – an assessment with which the Court disagrees – and that he did thus not face a real risk of ill-treatment, the domestic authorities did not

engage in an assessment on the availability of State protection against harm emanating from non-State actors. The parties disagree as to whether the Gambian authorities would be able and willing to provide effective protection to the first applicant against ill-treatment emanating from non-State actors, with the third-party interveners concurring with the applicant. The United Kingdom Home Office documents indicate that the Gambian authorities were generally unwilling to provide protection to LGBTI persons and that it would be unreasonable to expect an LGBTI person to seek protection from the authorities given the continued criminalisation of same-sex sexual acts in the Gambia (see paragraph 39 above, at 2.5). Similarly, UNHCR has been of the view that laws criminalising same-sex relations were normally a sign that State protection of LGBTI individuals was not available (see paragraph 36 above, at § 36).

63. In the light of the foregoing, the Court concludes that the domestic courts did not sufficiently assess the risks of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment emanating from non-State actors. Accordingly, the Court considers that the first applicant's deportation to the Gambia, without a fresh assessment of these aspects, would give rise to a violation of Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

64. Initially, the applicants had alleged that the refusal of a residence permit to the first applicant and the expulsion order against him, if implemented, infringed their right to respect for their family life, as guaranteed by Article 8 of the Convention. They argued that it was not possible for the second applicant to relocate to the Gambia, as he required continuous medical treatment for cancer; rather, in these circumstances, the support given to him by the first applicant was crucial. In order to avoid persecution in the Gambia, the first applicant would be required to maintain contact in a covert manner; yet, he could not be required to deny their relationship. Moreover, being required to suppress and hide his sexual orientation would infringe his right to respect for private life.

65. Following the second applicant's death during the proceedings before the Court, the first applicant acknowledged that the question of regular contact with the late second applicant no longer arose. His expulsion would nonetheless breach the right to respect for private life and family life: he would lose the opportunity to be where the memories of his late partner were. He had to have the right to visit his grave, to maintain the contacts he made through him, including his sisters, and to move in familiar, shared surroundings. He had lived in Switzerland for twelve years and integrated well into society, and now had a perfect command of the German language. He was financially independent thanks to the security provided by his late

partner, including an apartment and pension benefits, but would nonetheless like to work. His conviction by the Lucerne Criminal Court was based on an offence committed in 2011, prior to his relationship with his late partner; he had behaved correctly in recent years. In the Gambia he could not count on family support, notably his sister may not help him out of fear of being attacked herself. The situation of homosexuals in the Gambia had to be taken into account. He would have to keep his relationship with the late second applicant secret, and would be unable to enter into a new relationship. Balancing the competing interests, which the domestic authorities had not done in a sufficiently thorough manner, led to the conclusion that he had to be allowed to stay in Switzerland.

66. Article 8 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

67. The Government submitted that the question of physical separation and maintaining contact between the applicants and a violation of the right to respect for family life no longer arose following the second applicant's death. The latter's state of health had been taken into account by the authorities when they had set the date by which the first applicant had to leave Switzerland. The exercise of Article 8 rights concerning family and private life pertained, predominantly, to relationships between living human beings (see *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 104, 20 September 2018). The first applicant's ties to Switzerland and to the persons whom he knew thanks to his relationship with the late second applicant fell exclusively within the scope of the right to respect for private life.

68. They added that the first applicant, who had earlier exclusively relied on his relationship to the late second applicant, claimed to have established ties to Switzerland, to have learned German and to be willing to work only after the latter's death. His submissions in this respect lacked detail or were even contradicted by established facts: professional training programmes were discontinued owing to a lack of motivation on his part, and he had dropped out from a German language class at beginner's level A1 shortly before the Federal Supreme Court's judgment in 2018, after having been in Switzerland for ten years and in a relationship with the late second applicant for five years. Given his financial situation and the fact that he owned an apartment, it would be easily possible for the first applicant to travel to Switzerland to visit the late second applicant's grave and to maintain contact with family and friends; he could also maintain such contact via modern means of communication. Similarly, he could easily

resettle in the Gambia. The living conditions which the first applicant would face in the Gambia as a homosexual had already been taken into account in the Article 3 assessment and were, in the Government's submission, compatible with that provision; these conditions could not in themselves constitute a bar to his removal under Article 8. There was considerable public interest in removing the first applicant in view of his criminal conviction and behaviour. The domestic courts had thoroughly balanced the competing interests.

69. Having regard to the facts of the case, in particular the fact that the first applicant remained in Switzerland during the proceedings before the Court – in compliance with the interim measure indicated by the Court under Rule 39 of the Rules of Court – and that the question of the physical separation of the two applicants no longer arises after the second applicant's death, and its finding that the first applicant's removal to the Gambia would breach Article 3 of the Convention in view of the domestic courts' failure to sufficiently assess the risks of ill-treatment for him as a homosexual person in the Gambia and the availability of State protection against ill-treatment emanating from non-State actors, the Court considers that there is no need to give a separate ruling on the admissibility and merits of the complaint under Article 8 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

V. RULE 39 OF THE RULES OF COURT

70. 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 the reference 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.

71. It considers that the indications made to the Government under Rule 39 of the Rules of Court (see paragraph 21 above) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

73. The first applicant did not claim any pecuniary or non-pecuniary damage.

74. Accordingly, the Court makes no award under this head.

B. Costs and expenses

75. In application no. 43987/16, the first applicant claimed 2,000 Swiss Francs (CHF, approximately 1,850 euros (EUR)) for the costs incurred before the Federal Supreme Court. Explaining that she had not charged the first applicant any fees yet, but that she would do so in a comprehensive bill at the end of the proceedings, counsel added that she will charge the first applicant ten hours of work at an hourly rate of CHF 250 for the said proceedings before the Federal Supreme Court, that is, a sum of CHF 2,500 (approximately EUR 2,300). She asked permission to submit her claim for the proceedings incurred before the Court at a later stage, which would comprise translation costs in addition to the legal work.

76. In application no. 889/19, the first applicant claimed CHF 5,000 in fees incurred before the domestic courts (CHF 1,000 for the appeal to the Cantonal Department, CHF, 2,000 for the appeal before the Cantonal Administrative Court, and CHF 2,000 before the Federal Supreme Court). In addition, he claimed CHF 7,500 (approximately EUR 7,000) in representative's fees, corresponding to ten hours of work per instance at an hourly rate of CHF 250. Again, counsel indicated that the costs for the proceedings before the Court were not yet included in this claim.

77. The Government did not dispute the amount of court fees incurred in respect of both applications (CHF 7,000, approximately EUR 6,500). By contrast, they pointed out that the first applicant had not submitted his claims in respect of the representative's fees in accordance with the requirements of Rule 60 of the Rules of Court and had not accompanied them by any supporting documents. They asked the Court to therefore to reject the request in so far as it related to lawyer's fees.

78. According to the Court's settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (*Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). Noting the agreement between the parties that the first applicant had incurred EUR 6,500 in court fees before domestic courts, the Court awards the first applicant EUR 6,500 in this respect.

79. A representative's fees are actually incurred if the applicant has paid them or is liable to pay them. Accordingly, the fees of a representative who has acted free of charge are not actually incurred. By contrast, fees are incurred when the representative, without waiving them, has simply taken

no steps to pursue their payment or has deferred it. The fees payable to a representative under a conditional-fee agreement are actually incurred only if that agreement is enforceable in the respective jurisdiction (*Merabishvili*, cited above, § 371, with further references).

80. The first applicant did not submit bills for the representative's fees incurred in the proceedings, both before the domestic courts and the Court. However, counsel gave a precise explanation of the number of hours of legal work per instance in the domestic proceedings and the hourly rate and stated that she would charge the first applicant in a comprehensive bill at the end of the proceedings before the Court. Counsel added that further costs arose in the proceedings before the Court, but did not quantify these. In those circumstances, the Court decides to award the first applicant EUR 8,000 in respect of representative's fees incurred for the proceedings before the domestic courts and this Court.

81. The Court thus awards the first applicant EUR 14,500 in respect of costs and expenses, together with any tax that may be chargeable to him. It rejects the remainder of the first applicant's claim for just satisfaction.

C. Default interest

82. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Decides* to strike application no. 889/19 out of its list of cases in so far as the second applicant is concerned;

3. *Declares* the first applicant's complaint concerning Article 3 of the Convention admissible;

4. *Holds* that in view of the domestic courts' failure to sufficiently assess the risks of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment emanating from non-State actors, his deportation to the Gambia, without a fresh assessment of these aspects, would breach Article 3 of the Convention;

5. *Holds* that there is no need to examine the admissibility or the merits of the complaint under Article 8 of the Convention;

6. *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 first applicant until such time as the present judgment becomes final, or until a further decision is made;

7. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,500 (fourteen thousand five hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President