



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

Communicated on 29 March 2017

**THIRD SECTION**

Application no 43987/16

O.S.

against Switzerland

lodged on 22 July 2016

**STATEMENT OF FACTS**

1. The applicant, Mr O. S., is a Gambian national, who was born in 1974 and lives in St. Gallen. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4 of the Rules of Court). He is represented before the Court by Ms B. Surber, a lawyer practising in St Gallen.

**A. The circumstances of the case**

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

*1. Previous asylum and criminal proceedings:*

3. The applicant arrived in Switzerland in 2008 and applied for asylum under a false name and nationality. After establishing that his identity was false the Federal Migration Board dismissed the applicant's asylum request and ordered his expulsion.

4. In December 2012 the applicant was convicted *in absentia* and sentenced to 18 months imprisonment. He was imprisoned from September 2013 to September 2014 and from August to October 2015.

5. In March 2013 the applicant had already applied a second time for asylum, this time under his real name and nationality. He based his request on his homosexuality and the correlating risk of persecution in Gambia. His asylum request was denied.

6. In July 2014 the same sex partnership of the applicant and his partner was officially registered and they applied, in August 2014, for family unification, i.e. a residence permit for the applicant to stay with his partner in Switzerland.

7. In February 2015 the migration authorities refused the applicant's request and ordered his expulsion. The authorities further held that he had to await the outcome of possible appeals against the refusal outside

Switzerland. The applicant appealed against the refusal. The proceedings are still pending before the Administrative Court.

*2. Proceedings at issue:*

8. In response to the order that the applicant had to leave Switzerland and had to await the outcome of the main proceedings outside Switzerland he requested an interim measure, allowing him to stay in Switzerland during the appeal proceedings. This request was denied in March 2015. A subsequent appeal against the refusal was unsuccessful.

9. In December 2015 the Federal Supreme Court confirmed the refusal. It held that a summary assessment of the main proceedings showed that there was a high probability that the applicant's appeal in the main proceedings will not be successful, in particular owing to the criminal conviction of the applicant and his conduct during the asylum proceedings. The court further found that there were no concrete obstacles for the applicant to return to Gambia, at least temporarily. The applicant and his partner had so far only lived together for a very limited period since the applicant had been imprisoned for a considerable amount of time during their relationship. Furthermore, there were no indications that the Gambian authorities were aware of the first applicant's homosexuality or partnership. Therefore, the court found that there was no real risk for the first applicant under Article 3, when returned to Gambia.

**B. Relevant domestic law**

10. The relevant provisions of the Foreign Nationals Act (*Ausländergesetz*) read as follows:

**Article 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 clearly fulfilled, the competent cantonal authority may permit the applicant to remain in Switzerland during the procedure.”

**Article 42 – Family members of Swiss nationals**

“(1) The foreign spouse and unmarried children under 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.

(2) Foreign family members of Swiss nationals are entitled to be granted a residence permit and to have their residence permit extended if they are in the possession of a permanent residence permit from a country with which an agreement on the free movement of persons has been concluded. Family members are:

a. the spouse and the relatives in the descending line who are under 21 or who are dependants;

b. the relatives of either spouse in the ascending line who are dependants.

(3) After a law-abiding and uninterrupted period of stay of five years, a foreign spouse is entitled to be granted a permanent residence permit.

(4) Children under twelve are entitled to be granted a permanent residence permit.”

**Art. 51 Expiry of the right to family reunification**

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

a. they are exercised in abuse of the law, in particular to circumvent the regulations of this Act and of its implementing provisions on admission and residence;

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

(2) The rights in terms of Articles 43, 48 and 50 expire if:

a. they are exercised in abuse of the law, in particular to circumvent the regulations of this Act and of its implementing provisions on admission and residency;

b. there are grounds for revocation in terms of Article 62.”

**Art. 52 Registered partnership**

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

**Art. 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;

c. the foreign national or a person they must care for is dependent permanently and to a large extent on social assistance.

(2) The permanent residence permit of foreign nationals who have resided in Switzerland in a law-abiding manner for an uninterrupted period of more than 15 years may be revoked only on the grounds set out in paragraph 1 letter b and Article 62 letter b.

(3) Revocation is not permitted if justified solely by conviction for an offence for which a sentence or measure has been imposed, where the court has refrained from imposing an order for expulsion from Switzerland.”

**COMPLAINT**

11. The applicant complains under Article 3 of the Convention about his impending expulsion to Gambia. He fears that, owing to his homosexuality, even a temporary return to Gambia would expose him to a real risk of arbitrary detention, imprisonment and torture.

**QUESTION**

In the light of the applicant’s claims and the documents which have been submitted, would he face a risk of being subjected to treatment in breach of Article 3 of the Convention if the expulsion order were enforced?