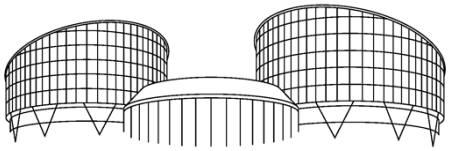

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF M.I. v. SWITZERLAND

*(Application no. 56390/21)*

JUDGMENT

Art 3 • Expulsion • Domestic courts' failure to sufficiently assess applicant's risk of ill-treatment as a homosexual man in Iran and of availability of State protection against such treatment by non-State actors • Removal to Iran without a fresh assessment of those aspects would entail a breach

Prepared by the Registry. Does not bind the Court.

STRASBOURG

12 November 2024

*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 M.I. v. Switzerland,**

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Georgios A. Serghides,
Ioannis Ktistakis,
Andreas Zünd,
Oddný Mjöll Arnardóttir,
Diana Kovatcheva*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 56390/21) 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 an Iranian national, Mr M.I. ("the applicant"), on 22 November 2021;

the decision to give notice to the Swiss Government ("the Government") of the application;

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 and the fact that this interim measure has been complied with;

the decision to give priority to the application (Rule 41);

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by the United Nations High Commissioner for Refugees (UNCHR), by Stonewall and African Rainbow Family, non-governmental organisations (NGOs) based in the United Kingdom, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 8 October 2024,

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

# INTRODUCTION

1. The application concerns the rejection of the homosexual applicant's asylum application by the Swiss authorities, who concluded that his expulsion to Iran would not expose him to a risk of treatment contrary to Article 3 of the Convention provided that he continued to live his private life there in a discreet manner upon his return.

# THE FACTS

2. The applicant was born in 1990 and lives in Zurich. The applicant was represented by Ms S. Motz, a lawyer practising in Zürich.

3. The Government were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice, and, more recently, by their Agent *ad interim*, Mr A. Scheidegger, of that same office.

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

## I. INFORMATION SUBMITTED BY THE APPLICANT

5. The applicant grew up in a small village in the Pars province of Iran in a very religious family with five brothers and one sister. In his late teens, he realised that he was homosexual, but concealed his sexual identity out of respect for his family and for fear of criminal sanctions from the Iranian police. In 2012, he signed up for military service, where he met his boyfriend, J.G. Meanwhile, his family pressured him to marry and encouraged him to consider female cousins as potential brides.

6. After his military service, the applicant found a job in a mobile phone shop in a market in Bandar Abbas and moved there with his boyfriend. Through his boyfriend, he met other homosexual men and in July 2017 they decided to announce their otherwise secret relationship to their friends by holding a small ceremony and exchanging rings and kisses and providing cake. Some of the friends took photographs of the couple kissing, much to the applicant's dismay.

7. A few months later, after an argument with the applicant's boyfriend, one of those friends, M., who according to the applicant was mentally unstable, sent photographs of the ceremony to the applicant's brother. On 17 April 2018, the applicant's father and two of his brothers arrived at the phone shop where the applicant was working. They showed him the compromising photographs and started swearing at him, punching him and twisting his wrists, trying to take him away by force. They accused the applicant of ruining the family's honour, which they said they must preserve. They tried to grab the applicant and, fearing for his life, he resisted. A scuffle ensued, during which the applicant managed to escape because his relatives did not want to attract too much public attention. However, in the scuffle he lost his mobile phone. Although the phone was locked, the applicant's relatives found photographs of the ceremony on its external memory card.

8. Fearing persecution from his family, the applicant then went with his boyfriend to Türkiye, where he registered with the UNHCR, stating that his homosexuality was the reason he had had to leave Iran. Two months later his boyfriend broke up with him and moved from Türkiye to join relatives in the Persian Gulf. Through one of his brothers, the applicant learned that his father and other brothers were planning to come to Türkiye to look for him, so he decided to leave the country.

## II. ASYLUM PROCEDURE IN SWITZERLAND

9. On 28 March 2019 the applicant applied for asylum in Switzerland. The Swiss State Secretariat for Migration (SEM), which is responsible for refugee status determination, interviewed him about his personal situation in April 2019, and then about the grounds for his asylum application twice, on 17 July and 30 August 2019. On 8 October 2019, the SEM rejected his asylum application, stating that it was not credible that the applicant did not know what the dispute between his boyfriend J.G. and their friend M. was about and that he had compromising images on his phone without security. In his initial SEM interview the applicant had given "superficial" details about the altercation with his relatives at the phone shop: his relatives had entered the shop, one of his brothers had touched his shoulder, then they had begun to insult him and to punch and slap him. During the second interview, after being prompted by additional questions, he provided details such as that when his relatives had arrived, he had been setting up chairs for the customers; that one of his brothers had touched him on the shoulder from behind; that another brother had shown him one of the compromising photographs; and that then they had punched and kicked him and wrung his wrists, but he did not mention that they had slapped him. The SEM therefore found that the applicant's accounts were inconsistent and lacked detail. It also found that, as the applicant had always hidden his sexual identity and lived discreetly, there was no risk of future persecution or ill-treatment in Iran. Besides, the applicant had stated that he would not have left Iran had it not been for the family dispute caused by the compromising photographs and had said that he had been able to avoid family pressure to marry a woman because he had had limited contact with his family, conducted mainly through audio or video calls.

10. The applicant appealed against the rejection of his asylum claim to the Federal Administrative Court (the FAC), which upheld the decision in a judgment of 2 June 2021. The FAC explicitly stated that the applicant's sexual orientation was not disputed. However, it examined in detail his statements in the interviews and, like the SEM, found them to be inconsistent with the allegations that his family had discovered his homosexuality and had tried to harm him. It concluded that the applicant's homosexuality was not known outside the LGBTI community in Iran. With regard to the situation of homosexual men in Iran, the FAC stated that, although in Iran homosexuality was prosecuted by law and there was a potential threat of the death penalty, homosexual men were not generally persecuted and that there was no real risk of serious harm as arrests of homosexual men rarely resulted in convictions. It based its conclusions on a number of international sources. The FAC concluded that a life of discretion would not result in intolerable psychological harm and it was unlikely that the applicant's sexual identity would be discovered if he continued to live discreetly. Therefore, in the view

of the FAC, there was no real risk of persecution if the applicant returned to Iran and continued to live his private life there in a discreet manner.

11. On 14 July 2021, the applicant applied for a review of the judgment of the FAC, arguing that it had overlooked certain facts, such as his registration with the UNHCR as a homosexual person who was seeking asylum on the grounds of gender-based persecution and he also argued that the FAC had ignored the case-law of the Court, in particular *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020, where the Court found that the Swiss authorities had failed to duly examine the potential risks of ill-treatment of a homosexual applicant at the hands of non-state actors in the Gambia.

12. On 15 July 2021, the FAC granted an urgent interim measure preventing the applicant's removal to Iran. On 29 July 2021, the applicant submitted a letter from the network Gay Leadership, a Swiss alliance of gay and bisexual men, whose representative had met with the applicant and provided the court with details of his fears of repercussions from other Iranians, including at the asylum centre in Switzerland, and who emphasised the extreme pressure of hiding one's sexual identity for one's entire life.

13. In a decision of 16 August 2021, the FAC revoked its urgent interim measure as there were no grounds for review of the decision to reject the applicant's asylum claim.

14. On 12 October 2021, the applicant provided the FAC with further information concerning the memory card containing the photographs from his mobile phone.

15. On 1 December 2022, the FAC rejected the applicant's request for review of the judgment of 2 June 2021, finding that the grounds relied on were essentially the same as before, that the request did not contain any new factual information, that the issues raised had already been examined in the judgment of which the applicant was seeking a review, and that his evidence of the circumstances of, *inter alia,* his altercation with the family members was still not credible.

## III. INTERIM MEASURE

16. On 22 November 2021, the applicant lodged a request for an interim measure under Rule 39 of the Rules of Court. Referring to Articles 2, 3, 8, 13 and 14 of the Convention, he stated that he risked arrest, ill-treatment and death at the hands of State agents, and/or the risk of death or ill-treatment at the hands of his family or society, as he would not have State protection. He argued that the FAC's conclusion that he would not have any well-founded fear of persecution if he lived his life discreetly was in breach of the Court's case-law. He applied for priority treatment and urgent notification of the application.

17. On 23 November 2021 the Court applied the interim measure under Rule 39 and indicated to the Swiss Government that it should not expel the applicant to Iran for the duration of the proceedings before the Court.

# RELEVANT LEGAL FRAMEWORK

## I. RELEVANT DOMESTIC LAW AND PRACTICE

18. For a summary of the relevant domestic law, see *M.A.M. v. Switzerland*, no. 29836/20, §§ 27-28, 26 April 2022.

## II. RELEVANT INTERNATIONAL MATERIALS

19. The relevant law of the European Union, the relevant practice of the Court of Justice of the European Union and the guiding principles and other relevant documents of the Office of the United Nations High Commissioner for Refugees ("UNHCR") concerning expulsion were summarised in *F.G. v. Sweden* [GC], no. 43611/11, §§ 48-53, March 23, 2016.

20. 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...
>
> 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 seeks 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 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. ..."

## III. RELEVANT COUNTRY INFORMATION ON THE SITUATION OF HOMOSEXUALS IN IRAN

21. The relevant part of the UN Human Rights Special Rapporteur's Report on the situation of human rights in the Islamic Republic of Iran (A/HRC/46/50) of 11 January 2021 reads (footnotes omitted):

"28. The death penalty can be imposed for consensual sexual activity between members of the same sex in the Islamic Republic of Iran, with its applicability dependent on the religion and marital status of the persons involved and the nature of the acts (passive or active) while "kissing and touching out of lust" between persons of the same sex is punishable by flogging. The criminalization of same-sex consensual acts legitimizes violence by State actors and private individuals, including the use of torture, beatings and rape by law enforcement and vigilantes. Lesbian, gay, bisexual and transgender persons face regular harassment and, if arrested, are denied the right to a fair trial. Other forms of violence and discrimination include sustained domestic abuse and bullying in educational institutions and workplaces. These acts remain largely underreported due to the victims' fear of persecution."

22. The UK Home Office's "Country Policy and Information Note: sexual orientation and gender identity or expression, Iran, June 2022" reported as follows (footnotes omitted):

"2.4.11. Of the 79 executions identified for same-sex sexual activity between 2004 and 2020, the offenders were all men. ... Although there have been fewer executions in recent years, at least 2 men were executed for 'sodomy by force' in 2021 and 2 more were executed for the same offence in January 2022 ...

2.4.17. Iran is a conservative Muslim society in which anti-LGBTI attitudes persist and are widespread. LGBTI persons face societal harassment, discrimination and stigma as well as family and societal pressure to conform to cultural and religious norms, for example, in terms of appearance and behaviour ...

2.4.18. LGBTI persons face threats, blackmail and extortion, harassment, forced marriage (or threats of such), pressure to undergo GRS, violence and 'honour' killings by non-state actors, including family members, on account of their sexual orientation or gender identity...

2.5.3 In general, the state may be able, but is not willing, to offer effective protection to LGBTI persons.

2.5.4 There are no laws to protect LGBTI persons against discrimination or hate crimes and sexual minorities are reluctant to report crimes against them for fear of revealing their sexual orientation and being criminalised...

3.2.3 The UK-based non-governmental organisation (NGO), 6Rang (Iranian Lesbian & Transgender Network), stated in a 2017 report that "Iran's Islamic Penal Code criminalizes same-sex sexual conducts with penalties ranging from flogging to the death penalty (Articles 233-240)...

4.2.1 According to 6Rang, "Since the establishment [of] the Islamic Republic in 1979, state officials in Iran have consistently portrayed homosexuality as a "deviant" sexual proclivity that has a corrupting effect on society." The 6Rang report cited comments made by public officials denouncing same-sex sexual relationships, describing them, amongst other derogatory words, as 'subhuman' and 'diseased'...

6.3.1 The September 2020 6Rang report found that 143 (over 62%) of the 230 survey participants had experienced some form of violence against them by their immediate family members. A quarter of the participants reported the threat of forced marriage:

"A great number of participants have also reported experiencing violence in their families because of their sexual orientation and gender identity. Experiences of violence in the family involve beating, flogging, psychological abuse, forced isolation from friends and society, verbal abuse, and death threats. ... Families may kill, physically harm, or force their members into arranged marriages with the intent to protect or defend the honour or reputation of the family and/or the community. Iranian LGBTI people often have no recourse to justice for the violence and abuse they suffer in their families. Participants have given accounts of being beaten by their families until they abandoned their homes or were told to become "normal"."

23. The Australian Department of Foreign Affairs and Trade published its "DFAT Country Information report Iran" on 24 April 2023, the relevant parts of which include the following (footnotes omitted):

"Sexual Orientation and Gender Identity

2.147 Sexual intercourse between males is illegal and can attract the death penalty. The death penalty is carried out against men who have consensual sex with men. DFAT is aware of reports of executions in February 2022, for example. Gay men may be pressured to undergo sex-reassignment surgery to avoid legal and social discrimination.

Gay men may also face homophobic violence, including members, from family members and others...

2.149 In September 2022, two Iranian LGBTI activists were sentenced to death for offences in including 'corruption on earth through the promotion of homosexuality' as well as trafficking, though observers said that this charge related to assisting people at risk to leave Iranian territory...

2.152 ... Discrimination can include harassment and violence and harassment from family members, work colleagues, religious figures, and school and community leaders. Ostracism from family is common, particularly in the case of conservative families. DFAT understands gay men and lesbians face considerable societal pressure to enter a heterosexual marriage and produce children.

2.153 DFAT assesses that LGBTI people face a high risk of official discrimination and violence that may amount to risk of death. DFAT applies this assessment to all LGBTI identities. DFAT further assesses that LGBTI people of any sexuality or gender identity or expression face a high risk of societal discrimination."

24. The relevant parts of the Statement of the Office of the United Nations High Commissioner for Human Rights of 21 June 2023 "Iran update on human rights" include the following (footnotes omitted):

"...The overall human rights situation in the Islamic Republic of Iran has markedly deteriorated ...

There have been numerous allegations of torture and ill-treatment of individuals by security forces during arrest and interrogation to extract forced confessions as well as allegations of sexual and gender-based violence committed against women, men and children, especially in detention. As previously reported, prison conditions including denial of medical care, dire sanitary conditions, contaminated drinking water and overcrowding, remain of concern...

Overall, the report shows a worsening human rights landscape in Iran coupled with the chronic lack of meaningful and effective avenues for the population to voice grievances or indeed to seek remedies..."

25. The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, Javaid Rehman, gave a report to the General Assembly of the United Nations on 24 August 2023, the relevant parts of which include the following (footnotes omitted):

"Use of death penalty

28. The Special Rapporteur remains deeply concerned at the alarming increase in the number of executions observed during the reporting period, including the implementation of the death penalty following unfair trials and after the systemic use of torture to extract forced confessions.

29. At least 582 people were executed in the Islamic Republic of Iran in 2022, including 256 for drug-related offenses, a significant increase compared with 2021

(...)

53. The Special Rapporteur notes that the Government's restrictive measures and repressive policies do not rely solely on laws or legal processes, but also on enforcement and use of force by a range of State authorities and private actors that are at the heart of

the State's control over the public and private lives of its citizens, particularly women and girls..."

26. The relevant parts of the Report of UN High Commissioner for Human Rights, Volker Türk, of 24 January 2024, include the following (footnotes omitted) :

"I am alarmed by the sharp spike in the use of the death penalty in Iran, including the executions of two men on 23 January. At least 54 people have reportedly been put to death in the country so far this year...

The right to due process and a fair trial for all defendants must be adhered to. I am also deeply disturbed by reports of forced confessions obtained under duress. Such confessions should not be invoked as evidence in any proceedings..."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

27. Referring to Articles 2 and 3 of the Convention, the applicant complained that if he were to be removed to Iran, he would face a real and imminent risk of arrest, ill-treatment or death at the hands of State agents and/or that he would become a victim of so-called "honour killing" or ill-treatment at the hands of his family or society and that he would be without State protection. The Swiss authorities had failed to duly assess the risk to him of ill-treatment and death if he were to be expelled to Iran.

28. Being the master of the characterisation to be given in law to the facts of the case, the Court finds it appropriate to examine these complaints under Article 3 of the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018). Article 3 reads as follows:

**Article 3**

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

### A. Admissibility

29. 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 applicant

30. The applicant argued that he had provided a detailed and consistent account of the events surrounding the discovery of his homosexuality by his family and the subsequent confrontation. Any minor inconsistencies perceived by the domestic authorities could be attributed to the emotional shock he had experienced during the altercation with his relatives. He maintained that his overall narrative remained consistent. The Government's argument, suggesting that his account lacked credibility because it seemed improbable that he would have had compromising photographs on his phone in a dangerous place like Iran, was countered by the fact that they simultaneously concluded it would not be dangerous for him to return there. The applicant stressed that asylum applicants should be given the "benefit of the doubt" by immigration authorities assessing their credibility.

31. The applicant further stated that the Swiss authorities neither contested his homosexuality nor the fact that he had concealed his sexual identity in Iran, where homosexual relationships are punishable by severe penalties, including death, and where LGBTI individuals face discrimination and harassment from the authorities. It was also acknowledged that his family, who were conservative and religious, had attempted to arrange a marriage for him with a woman. Despite these facts, the FAC had upheld the rejection of his asylum application on the basis that he had previously managed to keep his sexual identity hidden and could continue to do so in the future to avoid harm. The applicant stressed that according to the Court's case law, an individual's sexual orientation is an integral part of their identity, and no one should be compelled to conceal their identity to avoid persecution.

32. The applicant further stressed that the FAC had failed to carry out a comprehensive assessment of the potential risk to him of serious harm or death if he returned to Iran:

(1) there was no thorough examination of the risk of persecution or ill-treatment by State agents or of the imposition of the death penalty under the criminal law relating to homosexual relations. There was no rigorous assessment of whether the applicant would face serious harm or death if he lived openly as a homosexual man in Iran;

(2) there was no proper assessment of the risk of persecution that openly homosexual individuals faced from individual officials or vigilante groups, particularly in cases where there was no official prosecution, which further undermined the assessment of the applicant's safety on return;

(3) there was no evaluation of the potential risk posed by non-state actors, including the applicant's conservative family, who were aware of his homosexuality, as well as by wider society if he lived openly as a homosexual

man. No consideration was given to the lack of state protection given the criminalisation of homosexual acts and the legality of honour killings by family members.

33. The applicant stressed the importance of assessing the evidence in cases involving a risk of persecution on the basis of sexual orientation, particularly in countries where homophobia and discrimination against LGBTI persons were widespread. He argued that the domestic immigration authorities should have proactively assessed the availability of State protection against harm from non-State actors, given that the risk of his homosexuality being discovered would not depend solely on his conduct, and that they should also consider the broader societal context and the State's ability to provide protection in cases of persecution based on sexual orientation. The applicant asserted that the Swiss authorities had based their decisions primarily on outdated sources of information which did not reflect how the situation in Iran had deteriorated since the election in June 2021 of Ebrahim Raisi as President because of his radical religious views.

34. The applicant claimed that by failing to make a proper assessment of the above elements, the Swiss authorities had failed to carry out the necessary close, rigorous and independent examination of his case and failed in their duty to determine the country's situation.

**(b) The Government**

35. The Swiss authorities did not dispute that the applicant was homosexual, or that homosexual men in Iran faced risks from both state and non-state actors. However, they did not find the applicant's allegations regarding the compromising photographs and the subsequent problems with his family credible for the following reasons:

(1) The alleged conflict between the applicant's boyfriend and their mutual friend M. seemed implausible, as it was unlikely that the applicant would not have known the reasons for it, given its significance for his subsequent life. Moreover, the applicant and his boyfriend had spent two months together in Türkiye after fleeing Iran, which further cast doubt on the alleged conflict and the allegation that the compromising photographs had been sent to the applicant's brother.

(2) The applicant had failed to provide a plausible explanation for having the compromising photographs on his mobile phone without adequate security, given that he worked in a mobile phone shop and was aware of "a context as dangerous as that of Iran, where homosexuals are exposed to a high risk of severe persecution by the State". It was therefore not credible that the photographs existed and that the applicant's family had access to them.

(3) The applicant's accounts of the altercation with his father and brothers in the mobile shop were inconsistent and lacking in detail. His descriptions during the initial interviews were superficial and his subsequent elaborations,

prompted by additional questions, were unspecific and lacked emotion, which further undermined their credibility.

36. According to the Government, the applicant would not be at risk of ill-treatment if returned to Iran for the following reasons:

(1) Homosexual people were not subject to collective persecution in Iran and the mere criminalisation of homosexuality did not automatically lead to a serious risk of ill-treatment. The applicant did not claim to face a real risk of persecution; his homosexuality appeared to be known only to the local gay community, in which he had integrated without any problems.

(2) The abstract risk of exposure in Iran did not amount to intolerable psychological pressure, given that the applicant had lived there openly as a homosexual man for at least eight years without any significant problems. According to his own statement to the immigration authorities, he would not have left Iran had it not been for the alleged family dispute. In addition, he had been able to avoid the family pressure to marry a woman by limiting contact with his family. He would be able to continue living in the same way after his return to Iran.

(3) As the applicant's allegations about the sending of compromising photographs and the ensuing dispute were not credible, there was no reason to believe that he had been subjected to intolerable psychological pressure or persecution on account of his homosexuality. It was therefore unlikely that he would be persecuted in Iran, either by the authorities or by private individuals. The question of whether the Iranian authorities would be willing and able to protect him in the event of a risk of ill-treatment by private individuals did not arise in his case.

37. Domestic procedure complied with the requirements of the Convention: the applicant had had an interpreter at every hearing, had had legal representation throughout and had been able to lodge appeals with suspensive effect. Moreover, he had failed to show that there was a generalised practice among European States of systematically granting asylum to homosexual Iranian applicants.

**(c) The third parties**

*(i) The UNCHR*

38. The UNHCR emphasised that the fact that an applicant may be able to avoid persecution by concealment or exercising "restraint", or has done so in the past, is not a valid reason for denying refugee status. Concealing one's sexual orientation does not merely require individuals to be "discreet", but to "live a lie" about a fundamental aspect of their identity, while facing serious sanctions if their identity is discovered. Even if LGBTQI people have been able to avoid harm through secrecy, their circumstances may change over time and secrecy may not be an option for the rest of their lives. The risk of exposure may also not necessarily depend solely on their own behaviour.

Even if LGBTQI persons are discreet, they may still be at risk of exposure and related harm because they do not conform to heterosexual social norms (for example, by not marrying or having children). Denying refugee status and forcing individuals to be "discreet" or to conceal their sexual orientation and/or gender identity can have serious consequences for mental and physical health, and may lead to an intolerable situation amounting to persecution. It is also incompatible with the protective purpose of the Convention.

39. Given the importance of Article 3 of the Convention and the irreversible nature of the harm likely to be caused by ill-treatment, it is the duty of the national authorities to carry out a thorough and rigorous assessment in order to dispel any doubt that a particular claim for asylum is unfounded. In the context of asylum claims based on sexual orientation, the assessment should include an objective and factual examination of the nature of the applicant's situation and whether it amounts to persecution. In this context, the role of the decision-maker is to assess the risk - whether the fear of persecution is well-founded - and not to prescribe behaviour - what the applicant should or should not do.

40. The examining authority is expected to assess all relevant elements that are material to the determination of refugee status. The rejection by the State authorities of relevant documentary evidence submitted by the applicant without sufficient investigation was contrary to this requirement of close and rigorous examination.

*(ii) Stonewall and African Rainbow Family*

41. The organisation submitted that the Court must take into account the reality that a homosexual man returned to a state such as Iran must effectively prove that he is heterosexual in order to live discreetly. A need to conform with what a potential persecutor would consider acceptable "proof" of heterosexuality would potentially expose homosexual people to forced marriage, the risk of threats, extortion and blackmail, harassment, pressure to undergo gender reassignment surgery, violence and "honour" killings by non-state actors, including family members. In assessing an applicant's claim the Court should therefore assess the risk on the basis of the applicant's identity and the presumed risk of return. This requires an assessment of whether, at the time of the assessment, the applicant fits the heterosexual stereotype of the potential persecutor. Failure to fit this heterosexual profile would mean that return would give rise to a risk contrary to Article 3 of the Convention.

## *2. The Court's assessment*

### (a) General principles

42. The general principles concerning the responsibility of Contracting States under Article 3 of the Convention regarding the removal of aliens have

been recently summarised in *J.A. and A.A. v. Türkiye*, no. 80206/17, §§ 54-64, 6 February 2024, and the cases cited therein.

43. The Court has reiterated, in particular, that although asylum seekers should adduce evidence capable of proving that there are substantial grounds for believing that return would entail a real and concrete risk of treatment in breach of Article 3 (see *F.G. v. Sweden*, cited above, § 125), it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements (see, in particular, *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 92-93, 23 August 2016, and *K.I. v. France*, no. 5560/19, § 139, 15 April 2021). Even if some details may appear somewhat implausible, this does not necessarily detract from the overall general credibility of their claim (see *J.K. and Others v. Sweden*, cited above, § 93; see also *S.H. v. Malta*, no. 37241/21, § 85, 20 December 2022).

44. The Court has held that, in the context of applications for asylum based on a known general risk, where information on that risk is freely available from a wide range of sources, it is for the authorities, in order to comply with the obligation under Article 3 of the Convention, to carry out an assessment of that risk of their own motion (see *F.G. v. Sweden*, cited above, § 126, and the references cited therein, and *M.D. and Others v. Russia*, nos. 71321/17 and 8 others, § 97, 14 September 2021).

45. With regard to the standard of review of allegations of ill-treatment at the domestic level, the assessment made by the domestic authorities should be reasonable and sufficiently supported by domestic material as well as material from other reliable and objective sources (see, for example, *Mamazhonov v. Russia*, no. 17239/13, § 135, 23 October 2014, and the cases cited therein).

46. If the applicant has not yet been extradited or expelled when the Court examines the case, the present circumstances are decisive and a full and *ex nunc* assessment is required *(*see *A. v. Switzerland*, no. 60342/16, § 39, 19 December 2017).

**(b) Application of the general principles to the facts of the present case**

47. Since the applicant has not yet been removed to Iran, the question whether he would face a real risk of ill-treatment if returned there must be examined in the light of the current situation.

48. The Court considers that the general human rights situation in Iran is not in itself such as to preclude the expulsion of any Iranian national. It must therefore assess whether the applicant's personal circumstances are such that he would run a real risk of being subjected to treatment contrary to Article 3 of the Convention if deported to Iran.

49. First, unlike in the cases in which the applicant's sexual orientation raised credibility concerns (see, for example, *I.K. v. Switzerland* (dec.), no. 21417/17*,* §§ 27-28*,* 19 December 2017, and *A.N. v. France* (dec.), no. 12956/15, §§ 43-44, 19 April 2016), it is not disputed by the parties that

the applicant is homosexual. Second, the parties agree that a person's sexual orientation is 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 *B and C v. Switzerland*, nos. 889/19 and 43987/16, § 57, 17 November 2020, and *I.K. v. Switzerland*, cited above, § 24). Thirdly, it is not disputed by the parties that homosexuals in Iran are at risk from both State and non-State actors.

50. In the light of the foregoing, the Court considers that, whether or not the applicant's sexual orientation is currently known to the Iranian authorities, family members or the population, it could be discovered subsequently if he were to be removed to Iran (see also paragraph 32 of the UNHCR Guidelines, cited in paragraph 20 above). The Court therefore cannot agree with the Swiss authorities' assessment that it is unlikely that the applicant's sexual orientation would come to the knowledge of the Iranian authorities or population (see paragraphs 10 and 36 above).

51. In so far as the applicant alleges a risk of ill-treatment at the hands of the authorities, the Court notes that homosexual acts remain criminalised and subject to severe punishment under Iranian law. The Court has held that the mere existence of laws criminalising homosexual acts in the country of destination does not render a person's expulsion to that country contrary to Article 3 of the Convention; what is decisive is whether there is a real risk that these laws will be applied in practice (see *B and C v. Switzerland*, cited above, § 59). In respect of Iran, reports - and the submissions of the parties - indicate that prosecutions of LGBTI persons under these laws do take place in practice (see paragraphs 22-23 above).

52. Furthermore, persecution based on sexual orientation by State actors may also take the form of individual acts of "rogue" officials (see paragraph 34 of the UNHCR Guidelines in paragraph 20 above). While no such acts were mentioned in the recent reports on Iran, the UN Human Rights Council and the UK Home Office indicated that this could be due to under-reporting (see respectively, the report referred to in paragraph 21 above and paragraphs 2.4.17, 2.4.18 and 6.3.1 of the report referred to in paragraph 22 above) and that LGBTI persons who openly express their sexual orientation and/or gender identity are likely to face discrimination by State actors (see the reports referred to in paragraph 21 and paragraph 2.153 of the report referred to in paragraph 23 above).

53. The Swiss authorities dismissed the applicant's claim of persecution by his family members as not credible (see paragraphs 9 and 10 above). The Court sees no reason to depart from that assessment, as the national authorities are better placed to assess the credibility of an individual since they have had the opportunity to see, hear and assess his or her behaviour (see *F.G. v. Sweden,* cited above, § 118). The question of past ill-treatment as an indication of a real risk of future ill-treatment therefore does not arise (unlike in *J.K. and Others v. Sweden*, § 114, cited above).

54. However, ill-treatment may also be perpetrated by non-State actors other than family members (see paragraph 35 of the UNHCR Guidelines referred to in paragraph 20 above). International reports reflecting the most recent information on the situation of LGBTI rights in Iran point to widespread homophobia and discrimination against LGBTI persons following years of hatred stirred up by State actors (see paragraph 28 of the report referred to in paragraph 21, paragraphs 2.4.18 and 2.5.3. of the report in paragraph 22 and paragraph 23 above). The international sources stressed that such risks have even increased following the deterioration of the general human rights situation in Iran (see paragraphs 24-26 above).

55. In the light of the above information, the question arises as to whether the Iranian authorities would be able and willing to provide the applicant with the necessary protection against ill-treatment on grounds of his sexual orientation at the hands of non-State actors. The availability of such State protection should have been determined by the Swiss authorities (see *J.K. and Others v. Sweden*, § 98, and *B and C v. Switzerland*, § 62; both cited above,). However, since the domestic authorities took the view that it was unlikely that his sexual orientation would come to the knowledge of the Iranian authorities or population and that he therefore faced no real risk of ill-treatment, they did not carry out an assessment of the availability of State protection against harm at the hands of non-State actors, having declared that such a question did not arise in his case (see paragraph 36 above). The Swiss authorities therefore failed to carry out the necessary assessment and ignored the issue that underpinned the applicant's claims.

56. International sources indicate that the Iranian authorities would be unwilling to provide the applicant with effective protection against ill-treatment at the hands of non-State actors, 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 conduct in Iran (see paragraphs 2.5.3 and 2.5.4 of the report referred to in paragraph 22, and the reports referred to in paragraphs 23 and 41 above). Similarly, the UNHCR considers that laws criminalising same-sex relations are usually an indication that State protection is not available to LGBTI persons (see paragraph 36 of the UNHCR Guidelines in paragraph 20 above).

57. In the light of the foregoing, the Court concludes that the domestic courts did not sufficiently assess the applicant's risk of ill-treatment as a homosexual man in Iran or whether State protection against ill-treatment by non-State actors was available. Accordingly, the Court considers that the applicant's removal to Iran without a fresh reassessment of these issues would result in a violation of Article 3 of the Convention.

## II. REMAINING COMPLAINTS

58. The applicant complained under Article 13 of the Convention about the failure of the domestic authorities to examine his appeals against the expulsion order properly and a lack of domestic remedies. Having regard to the reasoning which led it to conclude that there had been a violation of Article 3 of the Convention in the present case, the Court finds nothing to justify a separate examination of the same facts from the point of view of Article 13 of the Convention. It therefore considers it unnecessary to rule separately on either the admissibility or the merits of the applicant's complaint under that provision (see *Amerkhanov v. Türkiye*, no. 16026/12, § 59, 5 June 2018).

59. Relying on Article 14 in conjunction with Article 8 of the Convention, the applicant complained that if he were returned to Iran his private life would be non-existent because he would have to deny his sexual identity.

60. Having regard to the facts of the case and its findings under Article 3 of the Convention, and also the fact that the applicant was allowed to remain 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 - the Court considers that there is no need to rule separately on the remaining complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *B and C v. Switzerland*, cited above, § 69).

## III. RULE 39 OF THE RULES OF COURT

61. 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 the case to it under Article 43 of the Convention.

62. The Court considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 17 above) should remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant claimed 2,800 euros (EUR) for pecuniary damage caused by the reduction of his welfare benefits as a result of the rejection of his asylum application.

65. The Government submitted that the applicant's claim for pecuniary damage should be rejected for two reasons: firstly, there was no causal link between the damage claimed and the alleged violation of the applicant's rights, and secondly, social assistance benefits could not be equated with income, the loss of which would constitute pecuniary damage within the meaning of Article 41 of the Convention. The applicant's claim was based on the assumption that, if he had been recognised as a refugee, he would automatically have continued to receive social assistance. However, under domestic law he would have been obliged to seek and accept work and would have been entitled to such benefits only to the extent that he could not reasonably find work. Moreover, unlike social security benefits, social assistance benefits must be repaid if the person's financial situation improves.

66. The applicant also claimed EUR 4,000 for non-pecuniary damage caused by the stress of the risk of expulsion and the exclusion from integration measures such as an Italian language course.

67. The Government argued that, as regards the exclusion from integration measures, there was no causal link between the alleged violation and the alleged damage. In any event, in the present case, a finding of a violation would in itself constitute sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

68. Having regard to its case-law and to equitable considerations, as required by Article 41 of the Convention, the Court rejects the claim in respect of pecuniary damage and finds that its conclusion that the applicant's expulsion to Iran, if carried out, would constitute a violation of Article 3 of the Convention represents sufficient just satisfaction in respect of non-pecuniary damage (see, for example, *M.A.M. v. Switzerland*, no. 29836/20, §§ 88-91, 26 April 2022).

## B. Costs and expenses

69. The applicant submitted that the total amount of the fees for his representation before the Court by his representative Ms Motz and an attorney from another law firm was 20,261 Swiss francs (CHF). Of this amount, CHF 6,300 had already been paid by an NGO, so that only the balance of CHF 13,961 would be invoiced to him after the conclusion of the proceedings before the Court, to be paid into the account of his representative, Ms Motz, as indicated in the applicant's submissions.

70. In the Government's view, the total amount claimed was excessive, as the case was neither unusual nor complex. In their view, CHF 6,000 would be a reasonable amount of compensation (see, *mutatis mutandis*, *M.A.M. v. Switzerland*, cited above, § 94; *B and C v. Switzerland*, cited above, § 80; and *X v. Switzerland*, no. 16744/14, § 73, 26 January 2017), and given that CHF 6,300 had already been paid by an NGO, the applicant's claim should be rejected.

71. 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 (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). 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 relevant jurisdiction (ibid., § 371, with further references).

72. The applicant submitted comprehensive itemised bills for the fees incurred in the proceedings before the Court with explanation of the number of hours of legal work and the hourly rate (see *B and C v. Switzerland*, cited above, § 80). In these circumstances, the Court decides to award the applicant EUR 7,000 in respect of the fees incurred for the proceedings before the Court.

73. The Court thus awards the first applicant EUR 7,000 in respect of costs and expenses, plus any tax that may be chargeable to him. It rejects the remainder of the applicant's claim for just satisfaction.

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 3 of the Convention admissible;

2. *Holds*, unanimously, that in view of the domestic courts' failure to sufficiently assess the risk of ill-treatment for the applicant as a homosexual person in Iran or whether State protection against ill-treatment from non-State actors was available in Iran, his return to Iran without a fresh assessment of those aspects of his case would breach Article 3 of the Convention;

3. *Holds*, by six votes to one, that there is no need to examine separately the complaints under Article 13 and under Article 14 in conjunction with Article 8 of the Convention;

4. *Holds*, by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Decides*, unanimously, 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 the present judgment becomes final, or until a further decision is made;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses**,** 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 applicant;
   (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;

7. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 November 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Milan Blaško<br>Registrar | Pere Pastor Vilanova<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

# PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. In the present case the applicant complained under Articles 2 and 3 of the Convention that, being a homosexual, if he were to be removed to Iran, he would face a real and imminent risk of arrest, ill-treatment or death at the hands of State agents and/or that he would become a victim of so-called "honour killing" or ill-treatment at the hands of his family or society and that he would be without State protection. The Swiss authorities had failed to duly assess the risk to him of ill-treatment and death if he were to be expelled to Iran. The applicant also complained under Article 13 of the Convention about the failure of the domestic authorities to examine his appeals against the expulsion order properly and a lack of domestic remedies. Lastly, the applicant, relying on Article 14 in conjunction with Article 8 of the Convention, complained that if he were returned to Iran his private life would be non-existent because he would have to deny his sexual identity.

2. The Court, being the master of the characterisation to be given in law to the facts of the case, found it appropriate to examine the Article 2 and 3 complaints only under Article 3 (see paragraph 28 of the judgment).

3. I agree with the judgment that there has been a violation of Article 3 and more specifically I agree with its operative provisions except points 3, 4 and 7. In particular, I disagree that there is no need to examine separately the complaints under Article 13 and under Article 14 in conjunction with Article 8 of the Convention (point 3); that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (point 4); and that the remainder of the applicant's claim for just satisfaction is to be dismissed (point 7).

4. Had I not been in the minority, I would have proceeded to examine the remaining complaints and to decide upon them. In disagreeing with the judgment's failure to examine the remaining complaints (see paragraphs 58-60 of the judgment), I refer back to the reasons I put forward in my partly dissenting opinion in *Zarema Musayeva and Others v. Russia* (no. 4573/22, 28 May 2024) without any need to reiterate them here.

5. The applicant claimed EUR 4,000 for the non-pecuniary damage caused to him, *inter alia*, by the stress of the risk of expulsion, an amount which – if I was not in the minority – I would probably award to him. I disagree with the holding of the Court that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see paragraph 68 of the judgment). I have explained in many separate opinions that such a holding is erroneous and contravenes the wording and aim of Article 41 of the Convention as well as the principle of effectiveness (see, *inter alia*, paragraphs 3-16 of my partly dissenting opinion in *Tingarov and Others v. Bulgaria,* no. 42286/21, 10 October 2023; paragraphs 22-38 of my partly concurring, partly dissenting opinion in *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September

2023; and paragraphs 4-10 of the joint partly dissenting opinion that I authored with Judge Felici in *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022). Accordingly, I will not elaborate on this matter again here.

6. Having voted against points 3 and 4 of the operative provisions, it was a logical conclusion for me to vote also against point 7 of the operative provisions dismissing the remainder of the applicant's claim for just satisfaction. If I were to examine and decide the complaints which were left unexamined by the Court, I would probably find a further violation or violations with a consequential increase of the amount of just satisfaction to be awarded to the applicant.

7. Another disagreement I have with the judgment – albeit not relating to a point in its operative provisions – is that the complaint under Article 2, which was the most serious and important complaint, was not examined at all by the Court because it decided that, being the master of the characterisation to be given in law to the facts of the case, it found it appropriate to examine the Article 2 and 3 complaints only under Article 3, without any examination under Article 2. As I also pointed out in my partly dissenting opinion in *Mandev and Others v. Bulgaria* (nos. 57002/11 and 4 others, 21 May 2024), the Court in that case, as well as in the present case, relies on its practice or principle, namely, that "it is the master of the characterisation to be given in law to the facts of the case", not in line with the aim thereof, but in a misguided manner. In my submission, this practice or principle, as applied so far, has been used and developed as a facet or manifestation of the principle of effectiveness. Its aim is to save complaints where, though their factual basis is established in an applicant's pleadings, the appropriate legal basis is not relied upon: the Court then considers these complaints of its own motion, under the appropriate Convention Articles or provisions. Surely, the aim of this practice or principle is not to completely overlook complaints without any examination, but rather to allow the Court to examine an application under the Convention Article or provision that it considers applicable, even if the applicants omitted to refer to it in their pleadings. For instance, the Court, in its judgment in the landmark Grand Chamber case of *Guerra and Others v. Italy* (19 February 1998, §§ 44-46, *Reports of Judgments and Decisions* 1998-I), by following the aforementioned practice or principle, held that it had jurisdiction to consider the case not only under Article 10 of the Convention, which was expressly relied upon by the applicants, but also under Articles 8 and 2 of the Convention, which had not been expressly invoked by them at the outset. In the end, the Court found a violation of Article 8 of the Convention and considered that it was unnecessary to consider the case under Article 2 of the Convention, while finding that Article 10 was not applicable.