



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

FIFTH SECTION

DECISION

Application no. 37478/16
A and Others
against Serbia

The European Court of Human Rights (Fifth Section), sitting on 18 April 2024 as a Committee composed of:

Stéphanie Mourou-Vikström, *President*,

Lado Chanturia,

Mattias Guyomar, *judges*,

and Sophie Piquet, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 37478/16) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 30 June 2016 by the applicants listed in the appended table (“the applicants”) who were represented by Mr N. Kovačević, a lawyer practising in Belgrade;

the decision to grant, following the first applicant’s death in 2020, the remaining applicants’ request to pursue the application on his behalf (for the purposes of this judgment, the Court shall hereinafter continue referring to him as the first applicant);

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 not to have the applicants’ name disclosed;

the decision to give notice of the application to the Serbian Government (“the Government”), represented by their Agent at the relevant time, Ms N. Plavšić;

the parties’ observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. This case mainly concerns the intended removal of a Libyan family, deemed to pose a threat to national security on the basis of classified

information, and the effectiveness of the remedies available to them to contest the two sets of the removal orders.

I. THE APPLICANTS' INTENDED REMOVAL ON NATIONAL SECURITY GROUND

2. The first applicant, who died in 2020, was a former administrative staff of the Libyan diplomatic mission in Serbia, appointed in 2010 by the Muammar al-Gaddafi's regime. When his term of office expired in 2014, he continued temporarily and lawfully residing in Serbia with his wife and three kids, the other applicants, on the basis of private business and children education respectively. Following a very brief, confidential and urgent request by the Security Intelligence Agency (hereinafter "the BIA"), in February and March 2015 the Ministry of the Interior revoked the applicants' temporary residence permits on the basis of Article 35 in conjunction with Article 11 § 1 (6) of the 2008 Aliens Act which provided for the revocation of the residence permit of a foreigner who posed a threat to "national security". The Ministry further ordered the applicants to voluntarily leave within fifteen days of receiving the decision and imposed an entry ban until 2025, without providing any factual ground, evidence or reasons for such decisions, as authorised by domestic law at the time. The decisions on residence revocation were considered as a basis for a forcible removal at the time.

3. The decisions contained information about a further legal avenue which the applicants could explore – specifically, an appeal with either the Interior Ministry or a diplomatic representation of the Republic of Serbia abroad. The applicants did not lodge an appeal, given the lack of reasoning and no suspensive effect, let alone automatic, of an appeal and application for judicial review, as prescribed by the General Administrative Proceedings Act ("GAPA").

4. Instead, on 18 March 2015 the applicants sought asylum, alleging imminent risk for their lives, on various general and personal grounds, if deported to Libya.

5. The applicants' asylum requests were rejected on 10 December 2015 and 11 February 2016 by the Asylum Office and the Asylum Commission, respectively, based on a succinct assessment that the applicants had intended to misuse asylum proceedings in order to avoid their removal. The Commission further stated that the applicants had failed to demonstrate that they would be at risk of persecution in the event that they were returned to Libya. In particular, according to the "UNHCR Position on Returns to Libya" of 2015, despite a state of instability, individuals with diplomatic status were not specifically identified as a vulnerable category and the situation improved in Tripoli.

6. The applicants challenged those decisions before the Administrative Court. UNHCR in Serbia sent a notification letter to the Administrative Court in order to draw its attention to the 2015 UNHCR Position, which urged all States to suspend forcible returns to Libya, including to Tripoli, and asked it to reconsider the previous asylum decisions in respect of the applicants accordingly.

7. By 26 May 2016, the Administrative Court dismissed the applicants' request to suspend the execution of the lower decisions pending its final decision, as well as their applications for an oral hearing and judicial review, finding the asylum decisions to be lawful.

8. None of the applicants have ever been detained or undergone any criminal proceedings in respect of alleged threat for national security.

9. In July 2016 the applicants lodged a constitutional appeal, complaining of a breach of the right to asylum, guaranteed by Article 57 of the Constitution, the principle of *non-refoulement* and the lack of effective domestic remedies.

II. SUBSEQUENT DEVELOPMENTS

A. Interim measure and communication

10. On 1 July 2016 the Court granted the applicants' request to indicate to the Government of Serbia, under Rule 39 of the Rules of Court, that they should not be removed to Libya or another country for the duration of the proceedings before the Court. In December 2017, it gave notice of the application to the Serbian Government.

B. Security reassessment and subsidiary protection

11. According to the Government, after being informed of the Court's intervention, the BIA carried out a security reassessment of the risks, albeit without the relevant documentation on the initial threat or security reassessment being submitted to the Court. In a confidential brief of 23 January 2018 submitted to the respondent State's Agent before the Court, the BIA concluded that the applicants were no longer deemed to pose a threat to national security. It was stated that in this case the interest in respecting the international obligations of the Republic of Serbia was of paramount importance and had therefore prevailed. The Government submitted that the BIA might also consider revoking the confidential status of the information leading to revocation of the applicants' residence permits and declaring the corresponding 2015 decisions (see paragraph 2 above) null and void.

12. Further, on 3 July 2018 the Asylum Office annulled its previous decision of 10 December 2015 (see paragraph 5 above) and granted to the applicants subsidiary protection they had sought. In its reasoning, the Asylum

Office accepted all the applicants' earlier arguments as regards the risks which they personally would face in the event of their forcible removal to Libya, including (i) the family's status as a specific social group (see paragraph 2 above); (ii) gender-related risks of female family members in post-conflict Libya; (iii) the first applicant's medical condition, in view of the health system collapsing in Libya; and (iv) that the applicants' house had been destroyed.

13. Lastly, certain legislative amendments have been made by adopting the new Law on Asylum and Temporary Protection and the Aliens Act in 2018.

C. Constitutional appeal

14. Subsequently, the applicants withdrew their constitutional appeal in respect of intended expulsion, as well as of the lack of effective domestic remedies concerning the proceedings before the asylum authorities and adhered to the remaining complaint about the ineffective legal remedies within the administrative removal proceedings. On 6 December 2018 the Constitutional Court terminated the part of the proceedings concerning the withdrawn complaints and dismissed the remaining complaint for non-exhaustion of the domestic remedies under the GAPA (Už-6006/2016), which had no suspensive effect at the material time (see paragraph 3 above).

THE COURT'S ASSESSMENT

15. The applicants complained under Articles 2 and 3 of the Convention that their deportation to Libya would expose them to a real risk of being killed, abducted or ill-treated by the various military and paramilitary formations there. They further complained of the ineffectiveness of the domestic remedies, submitting (i) that they could not challenge the removal orders without any information on the national security case, (ii) that the available remedies had not had any suspensive effect, and (iii) that their asylum requests had been rejected without any appropriate scrutiny of the risk which they had faced.

16. The Government invited the Court to strike the application out of its list of the cases as the case has been resolved at national level within the meaning of Article 37 § 1 (b), particularly having regard to the following factors: (i) the applicants had not suffered any damage as the authorities had not initiated forcible return; (ii) by granting subsidiary protection (see paragraph 12 above), the State had remedied all possible previous violations; and (iii) the State had made several legislative changes in respect of certain issues raised in the present case. Alternatively, the Government invited the Court to dismiss the remaining complaint, like the Constitutional

Court, for non-exhaustion of available legal remedies in the administrative proceedings (see paragraph 14 above).

17. In their reply, the applicants withdrew the part of their application related to the conditional violation of Articles 2 and 3 of the Convention alone in relation to the two sets of removal orders, and in conjunction with Articles 13 of the Convention, concerning the flaws in the proceedings before the asylum authorities (see paragraphs 5-7 above). Nevertheless, while referring to the cases of *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, ECHR 2007-II, and *I.M. v. France*, no. 9152/09, 2 February 2012, the applicants unequivocally insisted that the Court continue its examination of their remaining complaint under Article 13 of the Convention in view of the systemic issues within the proceedings for revocation of their residence permits (see paragraphs 2-3 above).

18. In the Court's view, it is necessary firstly to determine whether these circumstances justify that the application be struck out of the Court's list of cases.

I. APPLICATION OF ARTICLE 37 § 1 (A) OF THE CONVENTION

19. Taking into account the principles set out in its case-law (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, §§ 73-75, 23 March 2016), the facts of the case as a whole, in particular the fact that the applicants are not at risk of being removed from Serbia at the moment or in the foreseeable future, and their unequivocal wish to withdraw a part of the application before the Court (see paragraph 17 above), the Court concludes that no special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto require it to continue the examination of the withdrawn complaints in accordance with Article 37 § 1 *in fine* (see *M.E. v. Sweden* (striking out) [GC], no. 71398/12, § 37, 8 April 2015).

20. In view of the above, the Court accordingly finds that there is no reason for the indication of the interim measure made under Rule 39 of the Rules of Court (see paragraph 10 above) to remain in force.

21. However, there can be no question of striking the whole application out of its list of cases by applying Article 37 § 1 (a), as the applicants have expressly stated that they intend to pursue their remaining complaint under Article 13 (see, *mutatis mutandis*, *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 41, 21 October 2002).

II. APPLICATION OF ARTICLE 37 § 1 (B) OF THE CONVENTION

22. As regards the Government's call for striking the remaining complaint out by applying Article 37 § 1 (b), having regards to a conflict of opinion which appears to remain between the parties on the matter of effectiveness of domestic remedies in the proceedings on the residence revocation, as well as

the finding of the Constitutional Court in this respect (see paragraph 14 above), the Court does not consider that the circumstances justify such a course.

III. APPLICATION OF ARTICLE 37 § 1 (C) OF THE CONVENTION

23. Lastly, in order to decide whether the remaining part of the application should be struck out of the list in application of Article 37 § 1 (c), the Court must consider whether “the circumstances lead it to conclude” that “for any other reason ... it is no longer justified to continue the examination of [it]”.

24. The Court emphasises that any subsequent regularisation of an applicant’s status, such as a decision granting asylum, subsidiary protection or the right to residence, which prevents an intended expulsion and the materialisation of a potential violation of Articles 2 or 3 of the Convention, may be sufficient to remove an applicant’s victim status or may be seen as resolution of the disputed subject matter under those Articles (see, among many authorities, *Paez v. Sweden*, 30 October 1997, § 29, *Reports* 1997-VII; *Isman v. Switzerland* (dec.), no. [23604/11](#), 21 January 2014; *M.E. v. Sweden*, cited above, § 37; and *I.A. v. the Netherlands* (dec.), no. [76660/12](#), 27 May 2014; see also, *a contrario*, *F.G. v. Sweden*, cited above, §§ 80-84). However, it cannot be automatically applied in respect of Article 13. The Court has considered in certain cases that applicants who could no longer claim to be victims of Article 3 because the risk of their expulsion no longer existed, could still claim victim status as regards their complaints under Article 13 to the Convention. More specifically, when deportation or extradition had been delayed only as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court to prevent irreparable damage being done to the asserted Convention right, the facts constituting the alleged violation of Article 13 had already materialised by the time the risk of the applicant’s deportation had been prevented by the Court or had ceased to exist (see, for example, *Gebremedhin [Gaberamadhien]*, cited above, § 56; *I.M. v. France*, cited above, §§ 100-101, and *M.A. v. Cyprus*, no. [41872/10](#), § 120, ECHR 2013 (extracts), contrast to *Mir Isfahani v. the Netherlands* (dec.), no. [31252/03](#), 31 January 2008). Therefore, in these cases, unlike in the context of Article 3 of the Convention, there is no matter of potential violations being prevented by the granting of a specific status and the prevention of expulsion.

25. However, the Court considers that the particular circumstances of the present case differ significantly from the above-mentioned cases. Having regards to the applicants’ deliberate withdrawal of the part of the complaint under Article 13 in respect of the asylum proceedings, the material time for determination on whether the facts constituting the alleged violation of Article 13 had materialised is not the moment when the Court halted the expulsion by indicating the interim measure to the Government, as it was in

the cited cases. The material time in the present case is the termination of the proceedings for revocation of the applicants' residence permits and order to voluntary leave the Serbian territory, subject to forcible enforcement in a case of non-compliance (see paragraph 2 above). Hence, the applicants were not in a position comparable to the applicants in the cases of *I.M* or *Gebremedhin* at the material time for the examination of the present case. Admittedly, there was no remedy with an automatic suspensive affect available in the proceedings on the revocation of residence permits at the relevant time. However, even assuming, in view of the ambiguous legislation on forcible return, that the applicants were under an imminent threat of removal to Libya following the revocation of residence permits, they could and made use of the possibility to initiate the asylum proceedings with an automatic suspensive effect, at least at two levels (see paragraph 5-7 above), according to the relevant legislation and practice at the time. Notably, there is no indication in the case-file, nor the applicants argued it, that the authorities had tried to forcibly remove the applicants to Libya following the initial removal orders, either before or while their asylum claims were still pending until the conclusion of the asylum proceedings in April 2016. What is more, the above conclusion is further supported by the fact that the applicants filed a request before the Court to stay their return to Libya under Rule 39 only after the conclusion of the asylum proceedings (see paragraph 7 and 10 above). Therefore, the asylum claims halted the applicants' potential expulsion and prevented the materialisation of a potential violation of Article 13 at the relevant moment by putting the Serbian authorities in the situation, at least potentially, to make a thorough assessment of their complaints Articles 2 and 3 of the Convention. The fact that the part of Article 13 complaint concerning the asylum proceedings had been withdrawn by the applicants prevents the Court from examining further the scope of this avenue and its effectiveness in practice. Accordingly, the Court does not consider effective to continue examining the present case.

26. For the above reasons, the Court is satisfied that the applicants' Article 13 complaint in the remaining part can equally be struck out and that respect for human rights, as defined in the Convention and its Protocols, does not require it to continue the examination of the application under Article 37 § 1 *in fine* (see, *mutatis mutandis*, *M.G. and E.T. v. Switzerland* (dec.), no. 26456/14, § 102, 18 October 2016).

27. The interim measure previously indicated in this application therefore ceases to have any basis.

A AND OTHERS v. SERBIA DECISION

For these reasons, the Court, unanimously,

Declares to strike the application out of its list of cases.

Done in English and notified in writing on 23 May 2024.

Sophie Piquet
Acting Deputy Registrar

Stéphanie Mourou-Vikström
President

Appendix

List of applicants:

No.	Applicant's Name	Year of birth	Nationality
1.	Mr A	1962; the applicant died in 2020	Libyan
2.	Mr B	1991	Libyan
3.	Ms C	1993	Libyan
4.	Ms D	2000	Libyan
5.	Ms E	1967	Libyan