DOI:10.1017/ilm.2017.25

# INTRODUCTORY NOTE TO F.G. V. SWEDEN (EUR. CT. H.R.)

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[March 23, 2016]

## Introduction

In the Grand Chamber's ruling of March 23, 2016, the European Court of Human Rights (ECtHR) revisited the controversial case of *F.G. v. Sweden*,[1] which on January 16, 2014, had divided the Chamber's judges on the matter of assessing the risk of persecution for an Iranian national who had applied for asylum in Sweden.[2] The Grand Chamber held that there would be a violation of Articles 2 and 3 of the European Convention on Human Rights (ECHR) if the asylum applicant were returned to his home country without a risk assessment of his religious conversion, despite the fact that he did not invoke this as a ground for asylum in the original proceedings.

In its judgment, the Grand Chamber set out an obligation for the competent domestic authorities to assess, "of their own motion," an asylum seeker's risk of ill-treatment on grounds the state is made aware of when the rights guaranteed under Articles 2 and 3 of the ECHR are at stake. This obligation stands regardless of whether or not the applicant chooses to rely on those elements as the basis for his or her asylum application.

The case offers an interesting opportunity to reflect on a twofold issue concerning: (1) the assessment of the risk to the applicant of persecution; and (2) the meaning of the specific ground for being persecuted in order for an applicant to apply for asylum. Both aspects will be analyzed after a short summary of the relevant facts and proceedings of the case.

## The Factual Background and Chamber Judgment

The case at issue concerned an Iranian national who entered Sweden in 2009 and applied for asylum on the basis of his past political activities, including publishing web pages to oppose the regime in Iran. He had also participated in demonstrations and was arrested, reporting ill-treatment while being in detention.

Although the applicant alleged a real risk of persecution on political and religious grounds if returned to Iran, at the domestic level his application was rejected and the Swedish authorities ordered his expulsion. As noted by the Migration Court of Appeal, at the initial stages of the procedure the applicant stated that he had converted to Christianity in Sweden, but did not wish to rely on his conversion as a reason for asylum because he considered this circumstance merely personal. Nevertheless, at a later stage the applicant stated that the act of conversion from Islam to another religion was punishable by death in Iran and would "obviously cause [him] problems upon return."[3]

Failing to obtain adequate protection at the national level, the applicant complained before the ECtHR that if expelled to Iran he would be at a risk of punishment or death, relying on Articles 2 and 3 of the ECHR on the right to life and prohibition of degrading or inhuman treatment.

In its judgment of January 16, 2014, the Chamber confirmed the decision made at the domestic level and held that the implementation of the expulsion order against the applicant would not give rise to a violation of Articles 2 or 3 of the ECHR. The majority of judges found no violation of Articles 2 and 3 of the ECHR, considering the risk of political persecution weak and determining that the applicant's risk of persecution on religious grounds was speculative, while also noting that the applicant did not initially raise this as a ground for asylum.[4] As a consequence, on April 16, 2014, the applicant requested that the case be referred to the Grand Chamber.

## The Significance of the Grand Chamber's Reasoning

The appeal to the Grand Chamber allowed the Court the opportunity to address the mixed opinions among the three dissenting judges in the Chamber's ruling, who took the view that the majority had failed to adequately assess the risk of religious persecution, which was an aspect of major controversy.

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An overriding component of any asylum application is the assessment of the risk to the applicant of being persecuted. Although the drafters of the Geneva Convention on the Status of Refugees[5] agreed upon a definition of the term "refugee," the formulation does not set a clear standard for refugee status determination.[6] In this regard, the Grand Chamber took the opportunity to emphasize that "[i]t is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of exposure to a life-threatening situation covered by Article 2 or to treatment in breach of Article 3."[7]

The Court also distinguished an asylum claim based on an individual risk from one based on a well-known general risk. If the risk stems from a general and well-known situation, the authorities of the contracting state must carry out an assessment of the risk of their own initiative, as the Grand Chamber previously illustrated in the cases of *Hirsi Jamaa* and *M.S.S.*[8] Yet, the Court stressed that in situations of asylum claims based on an individual risk "it must be for the person seeking asylum to rely on and to substantiate such a risk."[9] Consequently, in a case where the applicant chooses not to rely on or disclose a specific individual ground for asylum, such as religious or political beliefs, "the State concerned cannot be expected to discover this ground by itself."[10]

However, taking into account the absolute nature of the rights guaranteed under Articles 2 and 3 of the ECHR and the vulnerability of asylum seekers, the Court held that where the state is *made aware* of facts that could expose an applicant to an individual risk of ill-treatment, regardless of whether the applicant chooses to rely on such facts, it is obliged to assess this risk *ex proprio motu*.[11]

The Court applied these principles to the present case, separating the examination of the applicant's political activities in Iran from his conversion to Christianity in Sweden. As to the political activities, the Court compared the applicant's case to other similar situations, such as *S.F. and Others v. Sweden*, *K.K. v. France*, and *R.C. v. Sweden*,[12] and concluded that the Swedish authorities were right in asserting that the applicant was not involved as an activist in extensive political activities. As to the conversion to Christianity, the Court reached a different conclusion by reflecting on the meaning of the specific grounds for being persecuted and the state obligation to assess all information brought to the attention of the authority.

**Contextualizing the Case: The Meaning of the Specific Ground for Being Persecuted**

The Grand Chamber's reasoning provides an interesting contribution to the interpretation of risk assessment concerning asylum seekers. Claims involving a risk of religious persecution are common in asylum and refugee law and while the parameters of this specific ground are not problematic, issues may rather arise as to a *sur place* conversion,[13] as the present case illustrates. Post flight conversions can have an opportunistic nature that, if it is apparent, can count heavily in the refugee status determination.[14] Nevertheless, it is crucial to stress that, although in the case at issue the applicant's conversion to Christianity was not questioned, the Chamber had found that there was nothing to indicate that the Iranian authorities could be aware of the applicant's conversion. Consequently, the Chamber had concluded that the applicant would not face a risk of ill-treatment by the Iranian authorities on this ground.[15]

In contrast, the Grand Chamber pointed out that the Swedish authorities failed to carry out a thorough examination of this risk of religious persecution on the basis that the applicant had not initially invoked this as a ground for asylum. The Court, therefore, carved out an obligation for the national authorities to assess "of their own motion" the risk to the applicant.[16] The Grand Chamber concluded that there would be a violation of Articles 2 and 3 of the ECHR if the applicant were removed to Iran without an assessment by the Swedish authorities of the consequences of his conversion.

Another interesting aspect of this decision is its comparison to the relevant case law of the Court of Justice of the European Union (CJEU), and namely the case of *Y and Z*.[17] In its ruling, the CJEU held that acts that interfere with a person's freedom to practice his or her faith in private and to also live that faith publicly may constitute a violation of the freedom of religion, and the potential for an individual to conceal a religious belief cannot be

relied on to dismiss the persecution risk and refuse protection. Similarly, the Grand Chamber referred to the CJEU case of *A, B, C*, concerning three applicants who had lodged an application for asylum in the Netherlands because they feared persecution in their respective countries of origin on account, in particular, of their homosexuality. In its conclusion, the Court held, inter alia, that national authorities are precluded from finding that "the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution."[18]

## Concluding Remarks

The Grand Chamber judgment in *F.G. v. Sweden* can be seen as a valuable contribution to the interpretation of asylum law, both in terms of setting domestic legal standards regarding the risk assessment for asylum applicants, as well as in assessing the risk of the private and public practice of religion. The importance of the decision mainly lies in the Court deciding that national authorities must asses "of their own motion" the risk to the applicant of factors they are aware of that may lead to persecution, regardless of whether or not the applicant chooses to rely on those elements in his or her asylum application. Also of note was the Court's reiteration of the long-standing guidelines of the Office of the United Nations High Commissioner for Refugees that "one should not be compelled to hide, change or renounce one's religious beliefs in order to avoid persecution."[19]

The manifold impacts of the judgment are also reflected in the interaction on refugee and asylum rights between the two supranational Courts in Europe,[20] the European Court of Human Rights and the Court of Justice of the European Union, demonstrating the broader context in which this judgment can be situated. Ultimately, the present decision might be seen as a step closer to achieving an enrichment of the standard of protection in this area of law and consolidating the guarantees for particularly vulnerable groups such as asylum seekers.

ENDNOTES

1 F.G. v. Sweden, App. No. 43611/11 (Eur. Ct. H.R. Mar. 23, 2016) [hereinafter Judgment].

2 F.G. v. Sweden, App. No. 43611/11 (Eur. Ct. H.R. Jan. 16, 2014) [hereinafter Chamber Judgment].

3 Judgment, *supra* note 1, ¶ 25.

4 Chamber Judgment, *supra* note 2, ¶ 41.

5 Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 [hereinafter Refugee Convention].

6 JAMES HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 111 (2014).

7 Judgment, *supra* note 1, ¶ 125.

8 Hirsi Jamaa and Others v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012); M.S.S. v. Belgium and Greece, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011).

9 Judgment, *supra* note 1, ¶ 127.

10 *Id.*

11 *Id.*

12 S.F. and Others v. Sweden, App. No. 52077/10 (Eur. Ct. H.R. May 15, 2012); K.K. v. France, App. No. 18913/11 (Eur. Ct. H.R. Oct. 10, 2013); R.C. v. Sweden, App. No. 41827/07 (Mar. 9, 2010).

13 HATHAWAY & FOSTER,, *supra* note 6, at 399.

14 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/04/06, at 12 (Apr. 28, 2004).

15 Chamber Judgment, *supra* note 2, ¶ 41.

16 Judgment, *supra* note 1, ¶ 156.

17 Joined Cases C-71/11 & C-99/11, Bundesrepublik Deutschland v. Y and Z (Eur. Ct. Justice Sept. 5, 2012).

18 Joined Cases C-148/13, 149/13 and C-150/13, A, B and C v. Staatssecretaris van Veiligheid en Justitie, Grand Chamber Judgment (Eur. Ct. Justice Dec. 2, 2014), ¶ 73.

19 Judgment, *supra* note 1, ¶ 52.

20 Francesca Ippolito, *A European Judicial Dialogue on Refugee Rights?*, 9 H.R. & INT'L LEGAL DISCOURSE 184 (2015).