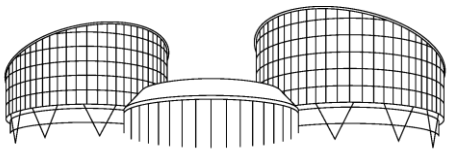

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF A.A. v. SWITZERLAND

(Application no. 58802/12)

JUDGMENT

STRASBOURG

7 January 2014

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 A.A. v. Switzerland,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller,
Egidijus Kūris, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 3 December 2013,

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

PROCEDURE

1. The case originated in an application (no. 58802/12) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sudanese national, Mr A.A. ("the applicant"), on 11 September 2012. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mrs S. Motz and Mr T. Hassan, lawyers practising in Zurich. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, and their Deputy Agent, Mr A. Scheidegger, of the Federal Office of Justice.

3. The applicant alleged that his expulsion to Sudan would be in breach of Article 3 of the Convention and, furthermore, that there had been a violation of Article 13 in combination with Article 3 of the Convention because he had had no effective remedy at his disposal regarding the establishment of his origins, the Swiss authorities having failed in their obligations in this regard.

4. Pending the proceedings before the Court the applicant requested that Rule 39 of the Rules of Court be applied. On 14 September 2012 the Vice-President of the Second Section, to which the case was allocated, decided to apply Rule 39 of the Rules of Court, and to grant priority to the application under Rule 41.

5. On 14 September 2012 the application was communicated to the Government under Article 3 of the Convention. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 11 June 2013 the President of the Section further required the parties to submit observations to the Court under Article 13 in combination with Article 3 of the Convention (Rule 54 § 2 (c) of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant claimed that he was born in 1985 in Zalingei, a village near the town of Kutum in the region of North Darfur, Sudan. He currently lives in the Canton of Zurich.

8. He also claimed to belong to the Fur ethnic group through his paternal line, and the Bergo ethnic group through his maternal line. He further alleged to have lived in Zalingei until 25 July 2004, when he had had to flee his village. He stated that shortly before he fled, his father had been killed and he had been mistreated by the Janjaweed, a militia that operates in Darfur and is in conflict with Darfur rebel groups, the Sudan Liberation Movement (hereinafter "the SLM") and the Justice and Equality Movement (hereinafter "the JEM"). His village had been burnt down by them, many of its inhabitants had been killed, and had had their cattle stolen. On 25 July 2004 he travelled from his home region to Port Sudan, from where he left by boat on 1 August 2004. Twenty days later he arrived in Calais, France, from where he went by train to Paris and then Geneva.

9. The applicant entered Switzerland on 23 August 2004 and applied for asylum the same day to the (former) Federal Office for Refugees (*Bundesamt für Flüchtlinge* – hereinafter "the FOR"). Since he was unable to produce any identity papers, on 13 September 2004 the FOR carried out a so-called "Lingua analysis", during which his cultural knowledge and Arab dialect were assessed by an expert in order to ascertain whether he originated from North Darfur. The FOR also held a hearing as per Article 29 of the Asylum Act. By a decision of 25 October 2004 it dismissed the applicant's asylum request, ruling that the Lingua analyst had demonstrated that the applicant definitely originated from Sudan but, owing to his Arab dialect, had concluded that he had most probably been socialised in Central or East Sudan, not in Darfur. The FOR further held that the applicant's statements regarding the region he allegedly originated from, the itinerary he had taken while fleeing, and the whereabouts of his relatives had been contradictory, incomplete or partly wrong. He had shown difficulties in pinpointing neighbouring towns and refugee camps near to the village where he had grown up, as well as in describing street conditions and the climatic particularities of that region. His knowledge of the Janjaweed had also been incomplete. Those inconsistencies led the FOR to conclude that

the applicant's declarations regarding his origins in North Darfur and the expulsion from his village at the hands of the Janjaweed were implausible. He could therefore safely be returned to Sudan without being put at risk of treatment contrary to Article 3 of the Convention.

10. The applicant appealed against this decision to the (former) Swiss Appeal Board for Asylum (*Schweizerische Asylrekurskommission* – hereinafter "the Appeal Board"). Specifically asked in those proceedings for personal documents, he stated that he had never possessed identity papers, and that all his other personal documents had been burnt during the Janjaweed's assault on his house. He had only known his date of birth because his parents had told him. On 15 February 2005 the Appeal Board endorsed the FOR's decision. In this decision it was also established that the FOR had breached the applicant's right to be heard because it had not given him an opportunity to contest the results of the Lingua analysis. The applicant had however been able to submit comments on the Lingua Analysis to the Appeal Board. The FOR's procedural failure had therefore been remedied.

11. After January 2008 the domestic authorities assumed that the applicant had left Switzerland unchecked. On 2 January 2009 he was however arrested and imprisoned in St Gallen for illegal residence in Switzerland.

12. On 7 January and 2 February 2009 respectively, the applicant lodged a second asylum request with the Federal Office for Migration (hereinafter "the FOM"), indicating that he had in the meantime become a political activist in Switzerland in such a way that he would face a real risk of persecution if expelled to Sudan. He explained that he had become an active member of the Sudan Liberation Movement-Unity (hereinafter "the SLM-Unity") in Switzerland, had been appointed its human rights officer, and had participated in several of its public activities since 2006. In addition, he also had become a member of the newly-founded Darfur Peace and Development Centre (hereinafter "the DFEZ") in Switzerland. He stated that because of an interview broadcast on a local TV channel in Eastern Switzerland, as well as several press releases in which his name had appeared, the Sudanese authorities had certainly identified him as an SLM-Unity member. It followed that if expelled, he would in all probability be arrested at the airport in Sudan and be exposed to a risk of treatment contrary to Article 3 of the Convention, not least because he originated from Darfur, had applied for asylum abroad and had spent many years outside his home country. With regard to his origins, he submitted an official extract from the birth register in Sudan issued on 26 July 1987 stating that he was born in Kutum, North Darfur, and a petition signed by twenty Darfuris living in Switzerland who confirmed that he originated from that region.

13. On 15 May 2009 the FOM dismissed the applicant's second asylum request; however, that decision was quashed on appeal by the Federal

Administrative Court (hereinafter "the FAC") on 28 May 2009. It ruled that, in accordance with domestic law, the FOM was under an obligation to consider the applicant's allegation regarding his political activities and possible grounds for asylum on the merits, and to conduct an oral hearing with him.

14. In the ensuing proceedings, the FOM formally granted the applicant the right to be heard regarding his political activities and possible grounds for asylum. The applicant thereby submitted his member pass for the SLM-Unity Switzerland, a membership confirmation letter from the president of that organisation, several pictures of himself at its demonstrations and meetings, and his entry passes to sessions of the United Nations Human Rights Council in 2009 and 2010.

15. By a decision of 8 June 2012 the FOM rejected the applicant's asylum request. It ruled that he had only joined the SLM-Unity after he had left his home country and after his first asylum request had been dismissed in 2005. He had not proven that he had in-depth knowledge of the structure and agenda of the SLM-Unity, nor had he been able to precisely describe his responsibilities as human rights officer of that organisation. According to the FOM, it was therefore evident that his political activities only served to create subjective post-flight grounds (*subjektive Nachfluchtgründe*). Furthermore, his statements regarding the interview given to the local TV channel had been very vague, and it was not established that the interview had been broadcast at national or international level. While the FOM did not dispute that the Sudanese government was monitoring political activities of opposition leaders abroad, it held that the authorities were only focusing on people with a high political profile. They did not have the resources to monitor people like the applicant, whose activities were carried out at low level. It was therefore unlikely that his political involvement had attracted their attention. In addition, the FOM ruled that the applicant, who had failed to submit identity papers and had made contradictory statements regarding his ethnicity, could *a fortiori* be returned to Sudan because the Lingua analysis had shown that he did not originate from Darfur, but from Central or East Sudan. Even assuming that he did originate from Darfur, this would not prevent him from relocating to another part of Sudan, for example Khartoum. It was also established that he had family ties in Sudan, and that his professional experience would facilitate his return.

16. The applicant appealed against this decision to the FAC. Regarding his origins in Darfur, he claimed that the FOM had ignored his birth certificate and had insisted on using the results of the Lingua analysis without explaining the discrepancies between the two documents. With respect to the assessment of his Arab accent in the Lingua analysis, he stated that he had learnt its correct pronunciation at the madrasa (Koran school) and not from his parents. Furthermore, if he did not originate from Darfur and had not personally experienced the people's suffering there or lost

almost all his relatives in the conflict, he would never have become so actively involved in the political cause of that region. Regarding his political activities, the applicant further stated that he had been the human rights officer of the SLM-Unity in Switzerland since 2009 and as such had participated in many political activities and international meetings. On one occasion, he had even met the current Sudanese president's brother in the United Nations building in Geneva, and had had an argument with him. He claimed to have appeared in the national and international news, on CNN, and to have featured with his picture in the *St Galler Tagblatt*, a Swiss newspaper. Therefore, he had certainly attracted the attention of the Sudanese authorities. Owing to his political involvement and to the general situation in Darfur, he alleged that he would be subjected to treatment contrary to Article 3 of the Convention if expelled there.

17. On 6 August 2012 the FAC dismissed the applicant's appeal. It held that the applicant's statements regarding the itinerary he had taken while fleeing already lacked credibility. Owing to rigid border controls, it was according to them almost impossible to get to Calais without any travel documents, even if they were only forged. The applicant should therefore have been able to submit some form of travel document. The FAC further considered that the birth certificate submitted had no value as evidence. It ruled that it could have been forged, since in Sudan such certificates were obtainable in exchange for bribes. However, even assuming that it was authentic, it was only evidence that the applicant had been born in Darfur, but not where he had grown up and been socialised. By contrast, the Lingua analysis of 21 September 2004 gave clear answers to those questions and had shown that the applicant originated from Central Sudan. Regarding the applicant's political involvement, the FAC endorsed the FOM's findings that his profile was not so high that it would have attracted the Sudanese government's attention or created a risk of persecution if returned to Sudan. The applicant's expulsion would therefore not be in breach of Article 3 of the Convention.

18. On 27 August 2012 the applicant's representative asked the FOM for access to the transcript of the Lingua analysis. By letter of 3 September 2012 it informed the representative that the applicant could listen to the interview conducted by the expert at its offices, but that the transcript contained some confidential information so could not be provided in full. The following details could be disclosed. The expert who had carried out the analysis originated from Central Sudan, where he had lived for thirty years; he had a university degree in linguistics, and had worked for the FOM since August 2003. He had interviewed the applicant on the following subjects regarding Sudan: (i) government and administration; (ii) agriculture; (iii) geography and (public) transport; (iv) traditions and customs; and (v) daily life. The applicant had answered all the questions correctly. His knowledge of his mother tongue Bargu had also been tested,

but he had been unable to count from one to ten in Bargu and his Arab dialect had resembled more that of someone from Central or East Sudan. The applicant had also lacked knowledge of a plant commonly grown in Darfur. The expert had therefore concluded that the applicant certainly originated from (Central) Sudan, but not from Darfur.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL INFORMATION ON SUDAN

A. Domestic Law

19. Articles 3, 7, 29 and 54 of the Asylum Act of 26 June 1998, as in force at the relevant time, read as follows:

Art. 3: Definition of the term refugee

"1. Refugees are persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or on account of their political opinions.

2. Serious disadvantages include a threat to life, physical integrity or freedom as well as measures that exert intolerable psychological pressure. Motives for seeking asylum specific to women must be taken into account.

3. Persons who are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages because they have refused to perform military service or have deserted are not refugees. The provisions of the Convention of 28 July 19511 relating to the Status of Refugees are reserved."

Art. 7: Proof of refugee status

"1. Any person who applies for asylum must prove or at least credibly demonstrate their refugee status.

2. Refugee status is credibly demonstrated if the authority regards it as proven on the balance of probabilities.

3. Cases are not credible in particular if they are unfounded in essential points or are inherently contradictory, do not correspond to the facts or are substantially based on forged or falsified evidence."

Art. 29: Hearing on the grounds for asylum

"1. The Federal Office shall interview asylum seekers on their grounds for asylum:

a. in reception centres; or

b. in the canton, within 20 days of the decision on allocation

1bis. If necessary, an interpreter shall be summoned.

2. Asylum seekers may be accompanied by a representative and interpreter of their choice who are not themselves asylum seekers.

3. Minutes shall be taken of the hearing. They shall be signed by those in the hearing, with the exception of the representative of the charitable organisations.

4. The Federal Office may entrust the cantonal authorities with the conduct of the hearing if this leads to a considerable acceleration of the procedure. The hearing shall be conducted in accordance with paragraphs 1-3."

Art. 54 Subjective post-flight grounds

"Refugees shall not be granted asylum if they only became refugees in accordance with Article 3 by leaving their native country or country of origin or on account of their conduct after their departure."

B. Relevant international information on Sudan

1. U.S. Department of State's 2011 Country report on human rights practices, Sudan

20. In the Executive Summary of its report, the U.S. Department of State observed that Sudan had been a republic transitioning, after the secession of South Sudan, toward a new constitution from a power-sharing arrangement established by the 2005 Comprehensive Peace Agreement. The National Congress Party had controlled the government. The Republic of South Sudan had formally gained its independence in July 2011. Conflict had however continued in Darfur and in the three border areas of Abyei, Southern Kordofan and Blue Nile.

21. The main human rights abuses documented had included government forces and government-aligned groups committing extrajudicial and other unlawful killings, security forces committing torture, beatings, rape and other cruel and inhuman treatment or punishment, and prison and detention conditions being harsh and life-threatening. Other major abuses had concerned arbitrary arrests and arbitrary, incommunicado, and prolonged pre-trial detention, executive interference with the judiciary and denial of due process and obstruction of humanitarian assistance. Except in rare cases, the government had not taken any steps to prosecute or punish officials in the security services and others in the government who had committed abuses. It was also reported that the government had harassed, arrested, beaten, and prosecuted human rights activists for their activities. Government security forces had beaten and tortured people in detention, including members of the political opposition, civil society activists, and journalists. These people had often been subsequently released without charge.

2. UK Foreign and Commonwealth Office's 2012 Human Rights and Democracy Report and 2013 Country update on Sudan

22. The Foreign and Commonwealth Office wrote that the human rights situation in Sudan had deteriorated in 2012, including new restrictions on

civil and political rights. The ongoing conflict in Darfur and the border areas with South Sudan had led to a worsening humanitarian situation, with continued reports of indiscriminate military tactics employed by the Sudanese Armed Forces leading to the displacement of hundreds of thousands of people within Sudan and into South Sudan. There had been widespread reports that security forces routinely carried out torture, beatings, rape and other cruel and inhumane treatment or punishment. Prison and detention centre conditions had sometimes been harsh and life threatening. With regard to NGO staff and political activists the Foreign and Commonwealth Office had received credible reports that they had been detained and interrogated by security services in 2012, particularly if they had been suspected of opposing the regime or of having links to the Sudan People's Liberation Movement North (hereinafter "the SPLM-North") or to South Sudan.

23. In its Country update of 30 June 2013 on Sudan, the Foreign and Commonwealth Office also observed that the human rights situation there had deteriorated significantly between April and June 2013, largely due to escalating conflict and insecurity. Fighting between the Sudanese government and the Sudan Revolutionary Front (hereinafter "the SRF", an alliance between the SPLM-North and the Justice and Equality Movement) had intensified. According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) figures, 63,000 people had been displaced in this fighting. Human rights groups also reported that the Sudanese government continued to detain without charge civilians suspected of being members of the SPLM-North in government-held areas in the Southern Kordofan and Blue Nile states. In Darfur, worsening insecurity had led to massive displacements, with the OCHA estimating that there had been over 300,000 new internally displaced people since the beginning of the year. Access to people affected by conflict in Darfur remained constrained owing to the Sudanese government's new Directives for Humanitarian Work issued in March, under which access by international humanitarian organisations and their staff to conflict areas became fully restricted.

3. Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, 2008

24. In its report dated 28 November 2008, the United Nations High Commissioner for Human Rights observed that Darfuris in the Khartoum area had been at a heightened risk of being subjected to arbitrary arrests, in particular if they had been suspected of maintaining links with Darfuri rebel groups or political movements. Darfuris might have raised the suspicion of the security forces by the mere fact of travelling from other parts of Sudan to Darfur, by having travelled abroad, or by having been in contact with individuals and organisations abroad. United Nations human rights officers

had conducted numerous interviews with Darfuris who had been arbitrarily arrested and detained. Many reported that they had been ill-treated and tortured. Reports on the questioning they had undergone in detention indicated that most of the detentions had been carried out to obtain information about Darfuri political groups and rebel movements.

4. Non-Governmental Organisations' reports

25. The *Amnesty International Annual Report 2013 on Sudan* established that post-independence agreements on the sharing of oil, citizenship and border demarcation had continued to be negotiated with South Sudan. Conflict had however continued in Darfur and in the Southern Kordofan and Blue Nile states. The National Security Service (NSS) and other government agents had continued to commit human rights violations against perceived critics of the government for exercising their rights to freedom of expression, association and assembly. In reaction to demonstrations that started on 16 June 2012, the NSS had carried out a wave of arrests across civil society, detaining hundreds of individuals, including not only protesters, but also lawyers, NGO staff, doctors, and members of youth organisations and political parties – regardless of their involvement in the protests. Many had been detained without charge, or had been tried summarily for rioting or disrupting public order and sentenced to fines or lashes. Many of them had been tortured or otherwise ill-treated by the NSS.

26. The Sudanese government had also continued its harassment of members of opposition groups. In October and November 2012, over 100 people suspected of being affiliated to the SPLM-North had been arrested in or around Kadugli and Dilling in Southern Kordofan. Grave human rights abuses had continued throughout Darfur amid continued fighting between the government and armed opposition groups, and a breakdown of government control over government-affiliated militias. Attacks on civilians by pro-government militias, aerial bombings, and looting and destruction of property had been widespread.

27. The *Human Rights Watch World Report 2013 on Sudan* stated in its Executive Summary that Sudan's relations with South Sudan had deteriorated in early 2012, leading to clashes along the shared border in April 2012. Although the two governments had signed an agreement in September to allow for the resumption of oil production, fighting between Sudanese government forces and rebel movements had continued in Darfur, as well as in the Southern Kordofan and Blue Nile states, where Sudan's indiscriminate bombardment and obstruction of humanitarian assistance had forced more than 170,000 people to flee to refugee camps in South Sudan.

28. The Sudanese authorities had harassed and arbitrarily arrested and detained other perceived opponents of the government, including suspected members of the SPLM-North, members of other opposition parties, civil

society leaders and journalists. Many people had been detained because of their real or perceived links to the SPLM-North, which had been banned in September 2011 when war broke out in the Blue Nile state, or as a result of their human rights activism.

C. Relevant case-law

29. The United Kingdom Asylum and Immigration Tribunal held in the case of *AA (Non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056 (18 December 2009)* that all non-Arab Darfuris, regardless of their political or other affiliations, were at risk of persecution in Darfur and could not reasonably be expected to relocate elsewhere in Sudan. Therefore, claimants who did not fall within the exclusion clauses were likely to qualify for asylum.

30. In a relatively recent judgment of 31 May 2013 *(E-1979/2008)*, the Swiss Federal Administrative Court held that subjective post-flight grounds – so-called *sur place* activities – constituted a risk for a Sudanese national of being exposed to treatment contrary to Article 3 of the Convention if expelled to Sudan. The FAC thereby undertook a thorough assessment of the current political and human rights situation in Sudan and Darfur. On the one hand, it found that although the security situation in Darfur remained generally unstable, it had improved in so far as the attacks targeted against particular ethnic groups (the non-Arab Darfuris) had diminished. Therefore, applicants had to show additional distinguishing features, such as political or other affiliations, to make their claim regarding persecution in Darfur credible. On the other hand, the FAC observed that the current human rights situation in Sudan was such that people who had publicly criticised the Sudanese government and had expressed their views about the current situation in Sudan and Darfur, or members of a Sudanese rebel group, were registered and often detained by the Sudanese government and the National Intelligence and Security Services. It cited country reports which established that Sudanese nationals who were returning to their home country after having stayed abroad for some time were likely to be interrogated by the Sudanese authorities, who would specifically question them about their contacts with opposition movements abroad. Therefore, people who had been in contact with the SLM, or who had even been publicly involved in their cause at the human rights meetings in Geneva, had certainly been registered by the Sudanese government and were at risk of being detained upon arrival. In the specific case the FAC concluded that the claimant could not be returned to Sudan because he had, on account of his publicly exposed political activities as high-ranking SLM member in Switzerland, certainly been registered by the Sudanese government and would therefore be at risk of persecution in his country of origin.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant complained that his expulsion to Sudan would expose him to a risk of treatment contrary to Article 3 of the Convention on account of his political activities in Switzerland. Article 3 of the Convention reads as follows:

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

32. The Government contested this complaint.

A. Admissibility

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

34. The applicant alleged that his political activities as a member of the SLM-Unity and the DFEZ in Switzerland would put him at a real risk of persecution contrary to Article 3 of the Convention if returned to Sudan. Relying on the case of *S.F. and Others v. Sweden* (no. 52077/10, § 68, 15 May 2012) he pointed out that the Court had recognised that political and human rights activities in the state of residence – the so-called *sur place* activities – were of relevance for the determination of the risk on return to the country of origin. Depending on the situation of the country of origin, even people with a rather low political profile in their home country could be at risk of persecution if their activities abroad had been publicly exposed and visible. The applicant reiterated that he had participated in many public activities and demonstrations with the SLM-Unity in Switzerland and that his appointment as human rights officer for that organisation had been published online in 2009. He submitted that he had taken part in, amongst other meetings, the 11th and 13th session of the United Nations Human Rights Council in Geneva, and in the Geneva Summit for Human Rights and Democracy in March 2010, at which he had met the current Sudanese President's brother, who had reproached him by saying that people like him had brought Sudan before the International Criminal Court. He had also attended a seminar with judges of the International Criminal Court in Zurich

in August 2010, at which representatives of the Sudanese embassy had been present. He claimed that his political activities had even had repercussions in the media at international level, which certainly had not gone unnoticed by the Sudanese authorities, who were monitoring the political activities of their citizens abroad. Relying on a report of the Swiss Refugee Council entitled *Sudan: Persecution of returning nationals on the ground of their political activities in exile* of 28 September 2005, he pointed out that the Sudanese government had infiltrated the JEM and the SLM domestically as well as abroad. Therefore, if people had stayed in contact with those organisations in Switzerland, they had certainly attracted the attention of the Sudanese authorities and were at risk of being detained. He concluded that if returned to Sudan, he would be detained, interrogated and tortured as soon as he got to the airport in Khartoum. Because of this, even relocation within Sudan was not possible.

35. In response to the Government's assumption that he had only become a political activist in order to create post-flight grounds, the applicant maintained that his political involvement was indeed genuine. He explained that after the dismissal of his first asylum request he had gone into hiding out of fear of being removed to Sudan. Despite his illegal residence status in Switzerland he had nevertheless decided to join the SLM-Unity in 2006, which demonstrated his commitment to the cause. Furthermore, in the interviews carried out by the FOM he had proved himself to possess in-depth knowledge of the structure and agenda of the SLM-Unity. Lastly, he stated that the organisation was very concerned about being infiltrated by people secretly reporting to the Sudanese government. If he was not from Darfur and had not been genuinely interested in the SLM-Unity's political agenda, its president would never have written him a confirmation letter and the organisation would have excluded him a long time ago.

36. According to the Government, the applicant's political activities within the SLM-Unity were low level and had not attracted national and international media coverage. The applicant had not participated particularly actively in the international human rights meetings he mentioned, and most of those meetings had taken place in 2010. He had not been particularly active thereafter. Regarding the interview given to the TV channel in Eastern Switzerland, the Government maintained that it had not disclosed his political activities. His rather vague descriptions of his responsibilities as human rights officer of the SLM-Unity in the course of the second asylum proceedings had not pointed to the fact that he occupied an important position, nor had the pictures he submitted showed him to be a particularly prominent figure within that organisation. His political involvement would therefore not put him at a risk of treatment contrary to Article 3 of the Convention if returned to Sudan, even more so considering that he did not originate from Darfur. Lastly, the Government observed that even if the

applicant did originate from Darfur, he could also relocate to another part of Sudan, for example Khartoum.

37. The Government further argued that the applicant's political involvement in the SLM-Unity and the DFEZ was not genuine and that he had only become a political activist in order to create subjective post-flight grounds not to be expelled to Sudan. Relying on the Court's case-law, they submitted that this factor had to be taken into account when assessing the applicant's risk of persecution (*N. v. Finland*, no. 38885/02, § 165, 26 July 2005, and *Kolesnik v. Russia*, no. 26876/08, § 70, 17 June 2010).

2. The Court's assessment

38. As established in the Court's case-law, Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). Expulsion by a Contracting State may however give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).

39. As established in the case of *Mohammed v. Austria* (no. 2283/12, § 109, 6 June 2013) the security and human rights situation in Sudan is alarming. Country reports further indicate that the situation has even deteriorated in the last few months (see paragraphs 20-28 above). However, while the Court has never ruled out the possibility of a situation of general violence in a country of origin triggering the application, and subsequently a breach of Article 3 upon the deportation of an applicant to the said country, it has also held that such an approach would only be adopted in the most extreme cases. It has generally insisted that an applicant shows that special distinguishing features existed in his case that could or ought to have enabled the Contracting State's authorities to foresee that he or she would be treated in a manner incompatible with Article 3 (see, *mutatis mutandis*, *NA. v. the United Kingdom*, no. 25904/07, §§ 114-115, 17 July 2008).

40. With regard to the situation of political opponents of the Sudanese government, the Court nevertheless holds that the situation is very precarious. From the Country reports and the relevant case law above (see paragraphs 20-30), it is evident that suspected members of the SPLM-North, members of other opposition parties, civil society leaders and journalists are frequently harassed, arrested, beaten, tortured and prosecuted by the Sudanese authorities. Because of the ongoing war in different states, the SPLM-North has been banned by the Sudanese government and accordingly many people were detained because of their real or perceived links with that

organisation. Furthermore, not only leaders of political organisations or other high-profile people are at risk of being detained, ill-treated and tortured in Sudan, but anyone who opposes or is only suspected of opposing the current regime. Moreover, it has been acknowledged that the Sudanese government monitors activities of political opponents abroad.

41. In the applicant's case, the Court notes that he has been a member of the SLM-Unity in Switzerland for several years. The Government however disputed the genuineness of his activities. In this regard, the Court acknowledges that it is generally very difficult to assess in cases regarding *sur place* activities whether a person is genuinely interested in the political cause or has only become involved in it in order to create post-flight grounds. In similar cases, the Court has therefore taken into account factors such as whether the applicant was a political activist prior to fleeing his home country, and whether he played an active role in making his asylum case known to the public in the respondent State (see *S.F. and Others v. Sweden*, no. 52077/10, §§ 66-67, 15 May 2012, and *N. v. Finland*, no. 38885/02, § 165, 26 July 2005). In the present case, the Court however also has regard to the fact that the applicant joined the SLM-Unity in Switzerland several years before he launched his second asylum request, at a time when it still might not have been foreseeable for him to apply for asylum in Switzerland a second time. In view of the importance which the Court attaches to Article 3 of the Convention as set out above (see paragraph 38), and the irreversible nature of the damage which results if the risk of torture or ill-treatment materialises, the Court therefore prefers to assess the applicant's claim on the grounds of the political activities he effectively carried out.

42. In this regard, the Court considers that the applicant's political activities have increased in importance over time, as illustrated by his appointment as human rights officer of the SLM-Unity in Switzerland and his participation in international meetings on the human rights situation in Sudan. The Court however agrees with the Government insofar as the applicant's political profile had not been very exposed. He had not, for example, delivered any talks in those conferences, and in the interview broadcast on the TV channel in Eastern Switzerland, he had not mentioned his political activities. The Court therefore considers that if the applicant were to be expelled to a country where the human rights situation of political opponents was less worrying than in Sudan, he would, on account of his political activities, not be exposed to a risk of treatment contrary to Article 3 of the Convention.

43. However, as set out above (see paragraph 40), not only leaders and high-profile people, but also those merely suspected of supporting opposition movements are at risk of treatment contrary to Article 3 of the Convention in Sudan. In the case of politically involved Sudanese nationals abroad, in particular those who had been seen to be affiliated with the SLM

at the international meetings in Geneva, it has furthermore been established that they had been registered by the Sudanese authorities (see paragraph 30 above). In view of the applicant's participation in the international human right meetings, where representatives of the Sudanese government were present and where usually only a few citizens of one country participate so that they are relatively easily identifiable, as well the applicant's argument with the current Sudanese president's brother, the Court cannot therefore rule out that he, as an individual, attracted the Sudanese government's attention. Having also participated in some of those meetings on behalf of the SLM-Unity Switzerland, the Court believes that the applicant might, at least, be suspected of being affiliated with an opposition movement by the Sudanese government. It therefore finds that there are substantial grounds for believing that he might be known to the Sudanese government and would be at risk of being detained, interrogated and tortured as soon as he arrived at the airport in Sudan. Moreover, he would not have the opportunity to relocate. Accordingly, the Court finds that the implementation of the deportation order against the applicant would give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 IN COMBINATION WITH ARTICLE 3 OF THE CONVENTION

44. Under Article 13 in combination with Article 3 of the Convention, the applicant complained that he had had no effective domestic remedy to assert his claims that he originated from Darfur and would be exposed to a risk of treatment contrary to Article 3 of the Convention if expelled there. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

45. The Government contested this complaint.

A. Admissibility

46. The Government observed that the applicant had not submitted any new evidence in the second asylum proceedings which would have put into question the earlier Appeal Board's decision of 15 February 2005, which had held that he did not originate from Darfur. The domestic authorities in the second asylum proceedings had therefore lawfully relied on that decision, and the applicant's complaints regarding the assessment of his origins by the domestic authorities were belated for the purposes of Article 35 § 1 of the Convention. The Government also argued that he had not contested the results of the Lingua analysis in either the first or second

asylum proceedings. According to the Government, he had therefore failed to exhaust domestic remedies as required by Article 35 § 1.

47. The applicant alleged that the new evidence submitted regarding his origins in Darfur in the second asylum proceedings indeed raised doubts about the Appeal Board's decision of 15 February 2005. He further maintained that he had not expected the Lingua analysis and the establishment of his origins to become a main issue in the second asylum proceedings, which had mainly focused on his *sur place* activities. Accordingly, he had not contested the Lingua analysis in the domestic proceedings regarding his second asylum request.

48. The Court notes that the Lingua analysis had been carried out in the first asylum proceedings which had ended by final decision of 15 February 2005. In the second asylum proceedings the domestic authorities only took into account the question of the applicant's origin to the extent of ascertaining whether the new evidence submitted by him was capable of raising doubts about the findings of the first asylum proceedings. The Court therefore considers that the applicant should have contested the execution of the Lingua analysis and the expert's background there and then, even more so as he had been granted access to the main content of the Lingua analysis in the first appeal proceedings, as established by the Government. The Court therefore accepts the Government's preliminary objection on this point. However, regarding the question whether the applicant's new evidence was able to raise doubts about the findings of the first asylum proceedings and whether the domestic authorities in the second asylum proceedings rightly relied on the results of the Lingua analysis as the sole evidence the Court finds that it is an issue that relates to the assessment of merits of the complaint rather than to its admissibility. The Court moreover finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

49. Relying on the Court's case-law, the applicant alleged that the Swiss authorities had failed in their duty to apply "close and rigorous scrutiny to ascertain all relevant facts" when assessing his provenance from Darfur and the possibility of him being exposed to a risk of treatment contrary to Article 3 of the Convention if expelled there (*R.C. v. Sweden*, no. 41827/07, § 53, 9 March 2010, and *Singh and Others v. Belgium*, no. 33210/11, §§ 103-104, 2 October 2012).

50. He argued that his statements regarding his origins and the itinerary he had taken while fleeing had always been clear, detailed and consistent throughout all the domestic proceedings. He claimed that the Government's argument – that entry into the Schengen area was impossible without a valid visa owing to rigid border controls – was inconsistent with the well-known fact that thousands of asylum seekers illegally cross those borders daily. To raise general doubts about his credibility based on that argument was therefore questionable to say the least.

51. He further submitted that his birth certificate was capable of proving his Darfuri origins. If the Government doubted its authenticity it was, according to the Court's case-law, their duty to take positive steps to verify it and hence to "dispel any doubts" about him being exposed to treatment contrary to Article 3 (*N. v. Sweden*, no. 23505/09, § 53, 20 July 2010; *N. v. Finland*, no. 38885/02, § 167, 26 July 2005; and *Singh and Others v. Belgium*, no. 33210/11, §§ 103-104, 2 October 2012). The FOM and FAC should therefore have had his birth certificate examined by the Forensic Institute in Zurich. By rejecting it summarily, they had failed to satisfy the requirements of Article 13 in combination with Article 3 of the Convention.

52. The applicant observed that he had not disputed in principle that the Lingua analysis could be used as one part of the evidence pertinent to determining his origin and hence his asylum claim. However, according to domestic law, it was an expert opinion which did not bind the deciding authority. He claimed that "close and rigorous scrutiny" was required by the domestic authorities to analyse the entirety of the evidence submitted to them. It was therefore incompatible with the requirements of Article 13 in combination with Article 3 of the Convention for the domestic authorities to have relied on the Lingua analysis as the sole or main piece of evidence, despite the fact he had adduced various pieces of evidence, which viewed as a whole, were clearly capable of proving that he originated from Darfur. His birth certificate, the confirmation letter from the president of the SLM-Unity Switzerland, the petition signed by twenty Darfuris and his political involvement for the Darfur cause were evidence enough to prove that he originated from that region.

53. He further claimed, citing the Court's case-law, that it would have been highly relevant for him, having had no legal representation in the first asylum proceedings, to have been automatically provided with a transcript of the Lingua analysis and background information on the expert in order to effectively challenge the analysis, especially since the Lingua analyst had never been socialised in Darfur. In not providing him with this transcript, the Swiss authorities had unjustifiably hindered the exercise of an effective remedy contrary to Article 13 in combination with Article 3 of the Convention (*M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 290, ECHR 2011).

54. The Government submitted that they had indeed applied close and rigorous scrutiny to ascertain all relevant facts to establish that the applicant would not be at risk of treatment contrary to Article 3 of the Convention if expelled to Sudan. Regarding the overall credibility of the applicant's submissions, the Government submitted that his statements regarding the itinerary he had taken while fleeing were only one piece of evidence, among others which raised doubts about the alleged persecution the applicant would face if returned to Sudan. As established in the first asylum proceedings, the applicant had also made inconsistent and contradictory statements about the name of the village where he claimed to have grown up and had further lacked basic knowledge of the region he claimed to originate from.

55. Regarding the authenticity of the applicant's birth certificate, the Government submitted that they had not summarily rejected it. Serious doubts about the document's authenticity had not only arisen because it was common knowledge that such certificates were obtainable in Sudan in exchange for bribes, but also because of the applicant's statements in the first asylum proceedings, according to which he had no identity papers because they had all been burnt during the Janjaweed's attack on his house, and had only known his date of birth because his parents had told him. Furthermore, since the applicant's identity had not been clarified conclusively, the birth certificate could have also potentially belonged to someone else. It did not contain any identifying elements such as, for example, a picture, on the basis of which it could, with absolute certainty, be attributed to the applicant. Lastly, even if it were authentic, it only proved that the applicant was born in Darfur, not where he had grown up. The Lingua analysis by contrast had proven beyond doubt that he did not originate from Darfur, but from Central Sudan.

56. Lastly, with regard to the Lingua analysis, the Government submitted that the applicant, contrary to his contentions and as established in the Appeal Board's decision of 15 February 2005, had been granted access to its main content during the appeal proceedings of his first asylum request, but had not challenged it. Accordingly, the authorities in the second asylum proceedings could not be reproached for having relied on the findings of the Lingua analysis, which had been scientifically put together by a duly qualified person.

57. The Government concluded by submitting that the domestic authorities had not failed in their obligations under Article 13 in combination with Article 3 of the Convention.

2. The Court's assessment

58. The Court holds that in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which results if the risk of torture or ill-treatment materialises (see

paragraph 38 above), the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny of any claim by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III).

59. In cases such as the present one, the Court acknowledges that it is often difficult to establish, precisely, the pertinent facts and that, as a general principle, the national authorities are best placed to assess not just the facts, but also the general credibility of the applicant's story (see *S.F. and Others v. Sweden*, no. 52077/10, § 66, 15 May 2012). The Court also reiterates that it is for the applicant to cite evidence capable of proving that there are substantial grounds for believing that, if removed from a member State, he or she would be exposed to a real risk of being subjected to treatment prohibited by Article 3 of the Convention. Where such evidence is cited, it is for the government to dispel any doubts about it (see *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008). The Court has recognised that asylum seekers are often in a special situation which frequently necessitates giving them the benefit of the doubt when assessing the credibility of their statements and the supporting documents they have submitted (see *R.C. v. Sweden*, no. 41827/07, § 50, 9 March 2010). However, when information is lacking, or when there is a strong reason to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see *Matsiukhina and Matsiukhin v. Sweden* (dec.), no. 31260/04, 21 June 2005; *Collins and Akaziebie* (dec.), no. 23944/05, 8 March 2007).

60. The Court observes that, in the present case, there is a dispute between the parties as to the applicant's origins in Darfur and his being exposed to a risk of treatment contrary to Article 3 of the Convention if expelled to Sudan. The Court thereby considers that the applicant, an allegedly non-Arab Darfuri who has become involved in the political cause of Darfur, certainly has an arguable claim under Article 3 of the Convention which needs to be assessed with close and rigorous scrutiny for the purposes of Article 13.

61. As previously held by the Court, the best way for an asylum seeker to prove his identity is by submitting an original passport. If this is not possible on account of the circumstances in which he finds himself, other documents might be used to prove his identity. A birth certificate could have value as evidence if other identity papers are missing (see *F.N. and Others v. Sweden*, no. 28774/09, § 72, 18 December 2012). In the present case, the applicant submitted a birth certificate in the second asylum proceedings to prove that he originated from Darfur. The domestic authorities however questioned its authenticity. The Court observes in this regard that the certificate was issued on 26 July 1987. In the first asylum proceedings however, he had alleged that he had lost all his personal documents in the fire started at his home in Darfur and claimed never to

have possessed a document showing his date of birth. Furthermore, the applicant has not provided an explanation as to where or how he obtained his birth certificate for the second asylum proceedings. The Court therefore agrees with the Government's findings that those circumstances raise serious doubts about the authenticity of the applicant's birth certificate and, more generally, about his being able to provide identity papers to the national authorities. In addition, the Court agrees with the Government that as long as the applicant's identity had not been fully verified, the birth certificate could also belong to someone else since it contains no distinctly identifying elements. In those circumstances, the Court is of the view that the domestic authorities rightly assumed that the birth certificate was not capable of proving the applicant's origins. Hence, they have not failed in their duty to dispel any doubts about its authenticity for the purposes of Article 13 in combination with Article 3 of the Convention.

62. With regard to the further evidence submitted in the second asylum proceedings, the Court agrees with the applicant that it is not reflected in the domestic decisions if and to what extent it had been taken into account by the national authorities in ascertaining whether it was capable of raising doubts about the findings of the first asylum proceedings. The Court however notes that those documents – the confirmation letter of the SLM president in Switzerland and the petition signed by the Darfuris – have no value as evidence with regard to the applicant's origins when taken alone. Since the Court is furthermore not convinced, as set out above, that the applicant has undertaken all possible steps to clarify his identity in the domestic proceedings, it holds that those documents are in themselves unable to raise sufficiently strong doubts about the findings of the first negative asylum decision.

63. In view of the foregoing, the Court considers that the domestic authorities cannot be reproached for not having undertaken a further investigation into the applicant's origins or for having relied on the results of the first asylum proceedings. The Court therefore concludes that Article 13 in combination with Article 3 of the Convention has not been violated.

III. RULE 39 OF THE RULES OF COURT

64. 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 reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

65. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The Court notes that the applicant has not claimed compensation for pecuniary or non-pecuniary damage.

B. Costs and expenses

68. The applicant claimed 5,069.10 Swiss francs (CHF) (approximately 4,114 euros (EUR)), inclusive of VAT, for legal fees and expenses incurred before the domestic authorities in the second asylum proceedings, less CHF 800 (approximately EUR 654) which he had been granted by way of legal aid by the Federal Administrative Court in the decision of 28 May 2009. He additionally claimed CHF 6,230.95 (approximately EUR 5,094), inclusive of VAT, for legal fees and expenses incurred before this Court.

69. The Government did not contest the applicant's claim regarding the legal fees and expenses incurred at the domestic level in the amount of total CHF 4,269.10 (approximately EUR 3,490), inclusive of VAT. However, they considered that the amount claimed by the applicant for the legal fees and expenses before this Court was too high if compared to similar cases such as *S.F.* (cited above). According to them, CHF 2,000 (approximately EUR 1,635) would cover all costs for legal fees and expenses before this Court and a total of CHF 6,300 (approximately EUR 5,150) would be sufficient to cover the total of the applicant's costs.

70. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,500 covering costs under all heads. The Court thereby takes into account that the applicant's fees note for the proceedings before

this Court dated 3 December 2012 and has therefore not included the costs and expenses incurred for the additional observations required by the Court on 11 June 2013.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that in the event of the enforcement of the Federal Administrative Court's decision of 6 August 2012, there would be a violation of Article 3 of the Convention;

3. *Holds* that there has been no violation of Article 13 in combination with Article 3 of the Convention;

4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order;

5. *Holds*

(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 8,500 (eight thousand five hundred euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses (to be converted into Swiss Francs at the rate applicable at the date of settlement);

(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;

Done in English, and notified in writing on 7 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President