



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

FIRST SECTION

**CASE OF A.L. v. AUSTRIA**

*(Application no. 7788/11)*

JUDGMENT  
(Merits)

STRASBOURG

10 May 2012

**FINAL**

*10/08/2012*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of A.L. v. Austria,**

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

Nina Vajić, *President*,  
Anatoly Kovler,  
Peer Lorenzen,  
Elisabeth Steiner,  
Khanlar Hajiyeu,  
Mirjana Lazarova Trajkovska,  
Julia Laffranque, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 17 April 2012,

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

## PROCEDURE

1. The case originated in an application (no. 7788/11) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Togolese national, Mr A.L. (“the applicant”), on 27 January 2011. 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, who had been granted legal aid, was represented by Mr B. Rosenkranz, a lawyer practising in Salzburg. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that if returned to Togo he would be subjected to persecution and arbitrary treatment, possibly leading to his death.

4. On 9 February 2011, the Court decided to apply Rule 39 of the Rules of the Court indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant.

5. On 30 May 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1988 and lives in Salzburg.

#### A. The asylum proceedings in Austria

7. On 20 November 2008 the applicant arrived at Vienna airport and applied for asylum.

8. During the asylum proceedings, the applicant was heard on 22 November and 25 November 2008, and on 6 July 2009. In the course of those interviews he submitted that he was a member of the political party UFC (*Union des Forces de Changement*), which was at the time an opposition party in Togo. In 2005, he was attacked by soldiers and members of the ruling party of Togo and thereupon fled to Benin, where he stayed until the end of 2006. He then returned to Togo.

9. In summer 2008, areas of Togo were flooded and the applicant and his family lost their house and their possessions. They thus moved to a camp for flood victims. The applicant claimed that relief items sent by international organisations were unequally distributed in the camp, which was why he and a group of other young members of the UFC criticised the distribution methods and attempted to distribute the goods themselves. However, soldiers threatened the applicant by saying, *inter alia*, that after the 2010 elections, the applicant and other UFC party members “would see what would happen.” This was the reason why the applicant decided to leave Togo and fled to Europe.

10. When making further statements on 6 July 2009, the authorities told the applicant that since the 2007 elections, the UFC held twenty-seven seats in the Togolese parliament. The applicant replied that he was aware of this. When asked who exactly had persecuted him, he repeated that during his stay in the camp for flood victims, he and other members of the UFC had organized demonstrations to demand fair distribution of the relief supplies, as some members of the UFC had not received any of the food donations. On 5 or 6 August 2008 the police came to the camp and told them they “would see what would happen”. The applicant left the camp on 7 August 2008 and stayed with a friend in Lomé for approximately two months. Subsequently, he went on to Ghana.

11. The applicant stated that he was afraid that upon his return, the police would kill him because of his membership of the UFC. To the asylum authorities’ reminder that the UFC was now an active and official part of the government, the applicant replied that the *de facto* regime of the last forty-three years was still in power and that there was no democracy in Togo.

12. On 6 July 2009, the Federal Asylum Office (*Bundesasylamt*) rejected the applicant's request for asylum and subsidiary protection and ordered his expulsion to Togo. It held that the fear of persecution described by the applicant was not credible and that the applicant's story seemed to have been fabricated around real events. In the event of his return the applicant would not face a real risk of a violation of Articles 2 or 3 or of Protocols Nos. 6 or 13 to the Convention.

13. With reference to the relevant country reports, the Federal Asylum Office stated that on 14 October 2007, parliamentary elections were held in Togo in which the former president's party, RPT, won fifty seats, the UFC twenty-seven seats and the party of the former prime minister, CAR, four seats in parliament. Despite the elections having been described as generally fair and free, Togo could not yet be considered a representative democracy. The 2005 presidential elections were considered rigged and had been accompanied by severe outbursts of violence. With regard to respect for human rights in Togo, the Federal Asylum Office held that although the situation had improved slightly, serious violations of human rights persisted, such as inhuman treatment of prisoners, impunity for illegal acts committed by the authorities, arbitrary arrests, prolonged detention pending trial, and similar. Freedom of opinion, freedom of the press and freedom of assembly were not generally respected. No violence on the part of state organs or government forces against opposition members had been recorded since the end of 2005. Opposition parties, media, associations of civil society and religious faiths were free to act.

14. Turning to the applicant's arguments, the Federal Asylum Office held that while the applicant's account of the flood and the tensions with the security forces in the camp were credible, the alleged threats by the police and the resulting fear of the applicant were not, and the fact that the police had apparently not used violence against the inhabitants of the camp was in contradiction with the applicant's statements. Furthermore, since the 2007 parliamentary elections the UFC had held twenty-seven seats in parliament. Lastly, according to the Federal Asylum Office's information, returned asylum seekers had not been subjected to systematic persecution. Therefore, the authority concluded that the applicant's claim for asylum was based on a fabricated story and that he had only submitted speculations on what could happen to him upon his return to Togo, and provided no indication of actual persecution against him on grounds recognized in Article 1 Section A Number 2 of the 1951 United Nations Convention Relating to the Status of Refugees. The Federal Asylum Office also rejected the applicant's application for subsidiary protection, holding that he would not be exposed to a risk of persecution if returned.

15. The applicant appealed and complained that he had been informed that it was not possible for the authority to collect more than three different pieces of evidence and had refused to take all the evidence the applicant had

put forward. He had also had difficulty understanding the interpreter properly and was never given a chance to tell his story, as he had only been asked questions to which he could answer “yes” or “no”. Thus, the authority should not be allowed to claim that the applicant’s account was too vague and unsubstantiated, as it had never given him the opportunity to substantiate his story. The applicant claimed that due to a translation error, it was not recorded that he had been beaten up by the police several times after he had participated in demonstrations in the wake of the 2005 presidential elections. In addition, the fact that he had fled to Benin and stayed there until 2006 had not been taken into account, and nor had the fact that the police had searched for him several times. The applicant had also been beaten up together with the other protestors when they had organised a demonstration in the camp for flood victims. He stated that even though the UFC was represented in parliament, regular UFC members were still subject to persecution, and in the event of his return to Togo, the authorities would “make him disappear” and probably kill him.

16. The Asylum Court (*Asylgerichtshof*) held a hearing on 29 April 2010. The applicant submitted a UFC membership card and confirmation that he had been an active member and had returned to Togo on 14 October 2007 after having fled to Benin. He also provided a newspaper article from the paper “Express” of 23 March 2010, according to which his cousin’s whereabouts after having been arrested were unknown, and the police were also looking for the applicant on account of his involvement in the demonstrations in the camp for victims of the floods in July and August 2008. Finally, the applicant submitted a newspaper article about a protest march in 2010 during which protestors were ill-treated by state forces.

17. In the course of the hearing, the Asylum Court emphasised contradictions in the applicant’s statement, for example, in relation to his school education, which he had allegedly followed until 2006 in Togo, although he claimed to have fled to Benin in April 2005. The applicant replied that he had spent the week in Togo to go to school, but the weekends in Benin for safety reasons and to avoid arrest in Togo. The Court also noted that the applicant had at one point stated that he had never been beaten up by the police, only verbally threatened, whereas he had then claimed to have been beaten up by the police in the course of the demonstrations in the camp for flood victims. The applicant referred to language problems in the drafting of his appeal to the Asylum Court. He repeated that he had never been beaten up by the police, but that they had wanted to arrest him because of the demonstrations about the unfair distribution of food in the camp. He had fled on 7 August 2008, after the soldiers had threatened to arrest him and the other demonstrators. The applicant also mentioned that another organizer of the demonstrations, M.A., had in the meantime been granted asylum in Austria.

18. On 7 May 2010, the Asylum Court dismissed the applicant's claim for asylum or subsidiary protection, and ordered his expulsion to Togo. It held that the applicant's claims were not credible, and the contradictions in his statements were not – as the applicant had claimed – due to translation errors. It stated that the newspaper article from the paper "Express" appeared to be a fake which had been paid for, as it was not probable that two years after the demonstrations in the camp a newspaper would still publish such a story. In addition, the statement of the UFC according to which the applicant had fled Togo and only returned in October 2007 was in contradiction with his statements that he had returned at the end of the year 2006.

19. The applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*) against that decision and applied for suspensive effect, which was granted on 30 July 2010. However, on 21 September 2010, the Constitutional Court rejected the applicant's request for legal aid and refused to deal with the complaint.

### **B. Application to re-open asylum proceedings**

20. The applicant applied for the proceedings to be re-opened (*Wieder-aufnahme des Verfahrens*), submitting a newspaper article from the paper "Le Patriote" dated 3 December 2008 which stated that due to the demonstrations in the camps, a clash between the police and a group of young people – among which the applicant was mentioned by name – had occurred. He also submitted other documents and a "verification report" in relation to the authenticity of the newspaper article from "Le Patriote", which had been drawn up in the course of M.A.'s asylum proceedings.

21. On 27 October 2010 the Asylum Court dismissed the applicant's request for the re-opening of the asylum proceedings. With regard to the newspaper article from "Le Patriote", it found that it was unlikely that a newspaper would report on events about food distribution in a camp for flood victims half a year after that occurrence. Furthermore, it was well known to the court that such articles could be easily bought in Togo and that the applicant had only presented the print-out of an internet download of the page, which was again an indication of it being a falsification. This conclusion could not be altered by the "verification report", which was not a reliable source for establishing the authenticity of the article and any resulting danger of persecution for the applicant, especially taking into consideration that it had not been drawn up in the course of the applicant's proceedings, but for entirely different proceedings. Even if the article from "Le Patriote" were considered evidence to support the applicant's story, it alone was not enough to outweigh all the other remaining inconsistencies in his account presented in the former proceedings.

22. The applicant applied for legal aid to lodge a complaint against that decision. However, on 15 December 2010, the Constitutional Court rejected the application for legal aid due to lack of the application's prospects of success.

### **C. The proceedings before the Court for an interim measure**

23. On 26 January 2011, the applicant, represented by counsel, lodged an application and a request for an interim measure under Rule 39 of the Rules of the Court to stay his expulsion to Togo.

24. On 9 February 2011, the President of the Section granted the request for an interim measure and asked the Government to inform the Court as to the exact content of the documents and the "verification report" submitted by the applicant in the proceedings for the re-opening of his asylum claim. Furthermore, if the document was public, the Government was asked to submit the "verification report" to the Court. Finally, they were requested to explain to what extent that report was relevant to the granting of asylum to M.A.

25. On 9 March 2011, the Government confirmed that the "verification report" had been commissioned by the Austrian authorities in the course of M.A.'s asylum proceedings to verify the authenticity of the same article from "Le Patriote", which had been submitted in M.A.'s asylum proceedings and which also featured M.A.'s full name, as it did the applicant's, in the context of the demonstrations in the camp for flood victims in relation to problems with the distribution of relief items. However, the Government emphasised that neither the authenticity of the article nor the chief editor's information on the extensive research done for the article could prove that the events were relevant to the applicant's asylum status. The Government further stated that the "verification report" was not public and that it did not concern the applicant. Therefore, reasons of data protection prevented the Government from submitting the whole report. With regard to the importance given to the article and the "verification report" in M.A.'s asylum proceedings, the Government submitted that the finding that the article was authentic carried no more weight in those asylum proceedings than other evidence, and that it had been considered together with all the other evidence in M.A.'s proceedings without taking any precedence.

### **D. M.A.'s asylum proceedings**

26. M.A. was interviewed for the first time by the Federal Asylum Office on 25 November 2008. He stated there that because of the flood in August 2008, his family had lost their house and moved to a camp for flood victims. In the camp, relief items were distributed by soldiers and social



workers; however, they did not allow him and his friends to help with the distribution, called them “members of the opposition” and threatened them by stating “you will see what will happen to you”. M.A. was again interviewed on 3 July 2009. Asked to freely narrate his reasons for fleeing his country, he added that at the camp for flood victims, only supporters of the ruling government had had access to the relief items, whereas other groups of people and M.A. himself had not. Several families had protested against those practices and eventually M.A. had organised demonstrations against the way relief items were distributed in the camp. As a result, the police had come, beaten them up and prohibited any further demonstrations. Police and security services had accused M.A. and his followers of causing disturbances in the camp and uttered their threats. M.A. had told the story to a member of the UFC, who had helped him to leave the country. M.A. further claimed that he had also been persecuted by the military in 2005 in the course of the presidential elections and the ensuing violent protests. Soldiers had come to his house several times, but he had never been there. He had also failed to comply with a number of summonses, but had left for Ghana and stayed there until 2007. He had returned to Lomé in 2007 and had not had any problems with the authorities until the events in the camp for flood victims.

27. On 19 October 2009, the Federal Asylum Office granted M.A. asylum in Austria. The decision did not elaborate on the reasons for granting him asylum in any depth. Referring to unspecified evidence in the file, the authority concluded that M.A.’s submissions concerning the reasons for his fear of persecution, taken in conjunction with the results of investigations conducted by it, were credible.

## II. RELEVANT DOMESTIC LAW

28. On 1 July 2008, an Austrian amendment statute repealed the possibility to lodge a complaint against a second-instance decision in asylum matters with the Administrative Court (*Verwaltungsgerichtshof*).

29. Before 1 July 2008, Article 129c of the Austrian Federal Constitution had provided the possibility for decisions taken in asylum matters in the first instance to be appealed against in the form of a complaint with the Independent Federal Asylum Panel (*Unabhängiger Bundesasylsenat*). To appeal against decisions taken by the Independent Federal Asylum Panel, an applicant had the option of lodging a complaint with the Constitutional Court and/or with the Administrative Court.

30. After the entry into force on 1 July 2008 of the amending statute in asylum matters, which established the Asylum Court and repealed the Law on the Independent Federal Asylum Panel, it was no longer possible to lodge a complaint with the Administrative Court due to lack of jurisdiction: since 1 July 2008, the Asylum Court has decided upon appeals brought

against decisions taken in asylum matters in the first instance. As concerns the possibility to lodge a complaint against a decision by the Asylum Court, Article 133 no.1 of the Federal Constitution reads as follows:

“Article 133. The following matters are excluded from the jurisdiction of the Administrative Court:

1. matters pertaining to the jurisdiction of the Constitutional Court;
- .....”

31. The new Article 144a of the Federal Constitution concerning jurisdiction of the Constitutional Court now reads – after the entry into force of the amending statute – as follows:

“Article 144a. (1). The Constitutional Court shall decide on complaints against decisions of the Asylum Court where the appellant alleges an infringement of a constitutionally guaranteed right by such decision ... .

(2) The Constitutional Court may decline to deal with a complaint ... if it has no reasonable prospects of success or if the decision is not expected to clarify a constitutional problem.”

32. In sum, Austrian asylum procedure includes the possibility of lodging a full appeal with the Asylum Court against a decision taken by the Federal Asylum Authority. Since 1 July 2008, the Austrian Administrative Court has no longer had jurisdiction over a complaint lodged against a decision by the Asylum Court. However, an asylum seeker can still lodge a complaint with the Constitutional Court alleging a violation of a right guaranteed under the Federal Constitution.

33. In Austria the European Convention on Human Rights has the status of a constitutional law (Federal Law Gazette 59/1964).

34. Finally, section 58 paragraph 2 of the General Administrative Procedure Act provides that a decision rendered by an administrative authority must only be reasoned if the party’s arguments were not fully adhered to.

### III. RELEVANT INTERNATIONAL INFORMATION ON TOGO

#### **A. The UNHCR Update on International Protection Needs of Asylum Seekers From Togo, dated 7 August 2006**

35. In August 2006, the United Nations High Commissioner for Refugees (UNHCR) updated his information on the international protection needs of asylum seekers from Togo. It referred to its position paper dated August 2005 in which it had urged, *inter alia*, a moratorium on forced returns in the light of the precariousness of the security situation in Togo following an outburst of human rights violations in the aftermath of the presidential elections of April 2005. In the twelve months since, the report

found that the situation in Togo had stabilised and in a number of ways improved. Reports of kidnappings and killings at night continued to be received but in substantially diminished numbers. There had been no fresh outbreaks of widespread violence. According to UN and diplomatic sources, the Togolese government evinced a genuine intention to resolve issues with the political opposition in the country, although this intention had not yet translated into meaningful reform. However, Amnesty International reported on the complete impunity in Togo for the perpetrators of the outbursts of violence in 2005. The UNHCR for its part acknowledged the difficulties balancing the desire for reconciliation and for justice and referred to a general amnesty announced by the Togolese Prime Minister, Edem Kodjo.

36. The UNHCR further referred to an avowed reluctance of many refugees to return to Togo, which was considered to be due in part to the lack of independent and reliable information on the treatment of individuals who had returned to Togo. It concluded that there was insufficient and contradictory information on the treatment of returnees to Togo to allow for a determination of the issue.

37. Based on the above conclusions, the UNHCR amended its position of August 2005 in respect to the international protection needs of Togolese asylum seekers and urged host countries to consider every asylum claim on the basis of their individual merits and pursuant to the requirements of the 1951 United Nations Convention Relating to the Status of Refugees. Individuals already recognized as refugees should for the time being retain their status. For individuals found not to be in need of international protection following the determination of their claims in fair and efficient proceedings including a right of appeal, UNHCR did not object to their return to Togo. Host States' obligations under the principle of *non-refoulement* under application of human rights law remained unaffected and compelling humanitarian reasons were to be given due consideration.

**B. *Schweizerische Flüchtlingshilfe* (Swiss Refugee Council):  
Information paper regarding membership of the UFC of 18 May  
2009**

38. Following an application by a Togolese refugee in asylum proceedings in Switzerland, the organization *Schweizerische Flüchtlingshilfe* created a report in May 2009 about the current situation of members of the opposition party UFC in Togo.

39. The UFC participated for the first time in the parliamentary elections on 14 October 2007. Pursuant to international observers, those elections took place peacefully and in an orderly fashion. The governing party RPT won fifty of the eighty-one seats of the Togolese parliament and the UFC, as the strongest opposition party, won twenty-seven seats. The UFC

contested the election results and claimed forged ballots. The independent national election commission, CENI, noted that more than 300 of 750 ballot boxes were not correctly sealed. However, the Constitutional Court finally confirmed the election results.

40. The report confirmed that from 2006 onwards the Government had bowed to international pressure and tried increasingly to re-establish national dialogue among the government, the opposition and representatives of civil society, since such a dialogue was a condition for the re-instatement of economic cooperation with the European Union. High-level members of the opposition were considered to be safe in view of the Togolese government's own interest in international approval of the democratisation process in the country and the ensuing economic consequences. However, the situation was different for opposition activists who had no public standing, and for "simple" members who went on protest marches and became entangled in skirmishes with the military. An [unnamed] expert on Togolese affairs was quoted as saying that those opposition members were still being secretly arrested, threatened and tortured, but that their stories would never be heard by the broader public.

41. Freedom of speech was still not guaranteed in Togo, a fact which was illustrated by the dissolution by use of teargas of a peaceful march organised by the UFC to mark the 49th Independence Day on 27 April 2009. It was unclear if demonstrators had also been arrested at the march.

42. The report concluded that UFC members of low public profile could still be victims of reprisals in Togo upon their return. Returnees from Europe were furthermore viewed with more suspicion than returnees from Benin or Ghana.

### **C. 2010 Human Rights Report on Togo of the United States Department of State dated 8 April 2011**

43. With regard to arbitrary or unlawful deprivation of life, disappearances and torture in Togo, the report referred to several notifications that the government or its agents had committed arbitrary or unlawful killings during the year. Amnesty International had reported that several people had died in detention in 2009 "probably as a result of torture or other ill-treatment". In January 2009, a UN special rapporteur found evidence that police and gendarmes abused detainees during interrogation, guards beat prisoners and young persons and children were at risk of corporal punishment while in detention. Impunity for such actions remained a problem.

44. On 4 March 2010, the RPT candidate Faure Gnassingbé was re-elected as president with 61 percent of votes cast. International and national observers monitoring that election declared it generally free, fair, transparent and peaceful. The government arrested and held sixteen political

detainees in connection with the presidential election, but denied that fact in public. As of September, according to Amnesty International and the League of Togolese Human Rights all sixteen detainees were released. None of those political prisoners had been mistreated.

45. Following the March elections, the UFC split into two factions, one led by Jean-Pierre Fabre, presidential candidate, and the other led by UFC president Gilchrist Olympio, who agreed to join the ruling RPT. As a result of an agreement between Olympio and the government, seven UFC ministers joined the presidential cabinet. As a result of internal rivalries in the UFC, the government banned the UFC weekly marches, justifying the action on the grounds that Fabre was no longer the lawful leader or the voice of the party.

46. Even though freedom of speech and of the press and freedom of assembly were guaranteed by the law and the constitution, the government continued to restrict those rights.

## THE LAW

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

47. The applicant complained that if returned to Togo he would be persecuted and subjected to arbitrary treatment that could lead to his death. He relied on Article 3 of the Convention, which reads as follows:

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

48. The Government contested that argument.

#### **A. Admissibility**

49. 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 submissions of the parties*

50. The applicant claimed that due to his membership of the UFC and the events in the camp for flood victims in 2008, where he had been threatened in the course of protests against the unequal distribution of relief

items, he would be at risk of persecution and probably death if returned to Togo.

51. The applicant submitted that the Austrian authorities had not sufficiently examined the newspaper articles he had provided in the domestic proceedings. He claimed that M.A. had been granted asylum on the basis of the article in “Le Patriote” taken in conjunction with the “verification report”, but that the Austrian authorities had failed to properly evaluate this information in his own proceedings.

52. The Government asserted that the applicant’s asylum claim had been examined in substance at two levels of jurisdiction based on extensive country reports that allowed for an evaluation of the security and human rights situation in the country of origin. The Federal Asylum Office and the Asylum Court had both thoroughly considered the applicant’s arguments and concluded after examining all the statements and evidence that the applicant would not be subjected to treatment contrary to Article 3 of the Convention if returned to Togo. The information on the general situation in Togo after the parliamentary elections in 2007 had not suggested that there was a real and concrete risk for the applicant. The applicant had not succeeded in the domestic proceedings in sufficiently substantiating his reasons for fleeing Togo.

53. When the applicant claimed that the Asylum Court had not properly evaluated the evidence submitted by the applicant, the Government replied that the statements made by the applicant had not been sufficiently conclusive and were in parts outright contradictory. The domestic authority had also considered the “verification report” of the article from “Le Patriote”, the confirmation letter of the UFC regarding the applicant’s membership and the article in the “Express” in its assessment of the credibility of the applicant’s statements. However, after consideration of all the relevant circumstances, the Asylum Court had found that those documents were not apt to prove that the applicant would face a real risk of treatment contrary to Article 3 of the Convention if deported to Togo.

## 2. *The Court’s assessment*

### a) **General principles**

54. It is the Court’s settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Hilal v. the United Kingdom*, no. 45276/99, § 59, ECHR 2001-II, and *Saadi v. Italy* [GC], no. 37201/06, § 124, ECHR 2008). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102,

Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports of Judgments and Decisions* 1996-VI).

55. However, expulsion by a Contracting State may 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 *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Ahmed*, cited above, § 39; *Chahal v. the United Kingdom*, 15 November 1996, § 80, *Reports* 1996-V; and *Saadi*, cited above, § 125).

56. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal*, cited above, § 60).

57. In order to determine whether there is a real risk of ill-treatment in this case, the Court must examine the foreseeable consequences of sending the applicant to Togo, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*). It will do so by assessing the issue in the light of all material placed before it, or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, 29 April 1997, § 37, *Reports* 1997-III, and, more recently, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, 23 February 2012).

58. If an applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time. Even though the historical position is of interest insofar as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light since the final decision taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I (extracts)).

#### **b) Application of the above principles to the present case**

##### *i. Information and material requested from the Austrian Government*

59. In order to be able to properly examine all the circumstances relevant to an assessment of the applicant's real and individual risk of ill-

treatment within the meaning of Article 3 in the event of his return to Togo, the Court requested the Government to supply additional information on the “verification report” and to explain to what extent that report had been taken into account in the comparable asylum proceedings of M.A., a Togolese national who had been granted asylum based on very similar reasons for fleeing his country as the applicant’s.

60. The Government complied in part and provided some information in their submissions of March 2011. However, the Court cannot but note that the Government failed to provide the “verification report”, relying on reasons of “data protection” without explaining in what way the submission of a “verification report” of a – presumably public - newspaper article could be considered to violate the domestic and/or general principles of data protection.

61. The Court reiterates that it is essential to the effective operation of the system of individual petition under Article 34 of the Convention that States should furnish all necessary assistance to make possible an effective examination of applications (see recently *Giuliani and Gaggio v. Italy*, no. 23458/02, § 269, 25 August 2009). In the present case the Court finds that the Austrian Government did not deal exhaustively with the Court’s requests for supplementary information.

*ii. Overall assessment of whether the applicant runs a real risk of suffering treatment proscribed by Article 3 in the event of his return to Togo*

62. However, the limited cooperation on part of the Government does not prevent the Court from examining the applicant’s complaint on its merits (see, *mutatis mutandis*, *Giuliani and Gaggio*, cited above, § 270, which was confirmed by *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 343-344, 24 March 2011).

63. The Court acknowledges that the applicant in particular based his argument on the fact that M.A., who had comparable reasons for fleeing Togo, was granted asylum in Austria presumably due to the newspaper articles provided and the “verification report”, and the applicant was not. However, the Court reiterates that in a situation such as the applicant’s it is its task to evaluate a complaint under Article 3 of the Convention from the standpoint of the time of the proceedings before it (see paragraph 58 above), and not from the historical perspective of the domestic proceedings.

64. The Court shall therefore proceed to assess whether the applicant would run today a real risk of suffering treatment contrary to Article 3 if returned to Togo. Firstly, taking the applicant’s membership of the opposition party UFC into account, the Court notes that according to the more recent reports on Togo, the UFC won twenty-seven seats in the Togolese parliament in the elections of 2007. After the presidential elections in March 2010, the UFC split into two factions, one of which decided to



cooperate with the ruling RPT and nominated seven ministers in the current cabinet.

65. The Court shall now turn to the events of summer 2008 in the camp for flood victims. The applicant alleged that he had taken part in, and maybe even initiated, demonstrations against the unequal distribution of relief items, claiming that UFC party members were discriminated against by soldiers and social workers responsible for the allocation of the goods. Upon the protests, the applicant, and others, had been threatened that “in 2010, there will be elections and then you will see what will happen”. The applicant claimed that at the time this statement amounted to a serious threat.

66. In the light of the subsequent developments, the widely acknowledged as peaceful presidential elections in March 2010 and the participation of the (remaining) UFC in the current cabinet, the Court finds that even if the threat uttered by the soldiers in summer 2008 had carried sincere weight as a sign of a real and individual risk of persecution at the time, there is no indication that this is still the case.

67. Finally, the Court acknowledges that the reports consulted do not rule out the occurrences of human rights violations such as arbitrary detention, ill-treatment and a lack of respect for freedom of speech and freedom of assembly on the part of the Togolese government. However, in the light of the material before it, the Court cannot come to the conclusion that the applicant would suffer a real and individual risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Togo.

68. Accordingly, the applicant’s expulsion to Togo would not violate Article 3 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

69. The applicant also complained of a lack of an effective remedy and relied in this context on Article 13 of the Convention, which 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.”

70. The applicant alleged that since the Constitutional Court did not have jurisdiction to set aside a decision in asylum proceedings on the basis of a contestation of the evaluation of evidence, but only on the basis of a violation of a right guaranteed by the constitution, he was deprived of an effective remedy. Following an amendment of the law, the applicant no longer had the possibility to lodge a complaint with the Administrative Court, which could have determined whether any rights guaranteed by the law had been violated in the course of the asylum proceedings.

71. The Court notes that an asylum seeker in Austria has the right to challenge a decision taken in his or her asylum proceedings as a first step before the Asylum Court, which has jurisdiction over a full appeal. Subsequently, a complaint against an appeal decision rendered by the Asylum Court can be lodged with the Constitutional Court, alleging a violation of rights guaranteed under the Austrian Federal Constitution.

72. The Court reiterates that Article 13 guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy allowing the competent “national authority” both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see, among other authorities, *Vilvarajah and Others*, cited above, § 122).

73. In the present case the Court concludes that the applicant had access to two levels of jurisdiction, which examined his arguable claim under Article 3 of the Convention on its merits and conducted a thorough assessment of whether there existed substantial grounds for believing that there was a real risk of treatment contrary to Article 3 upon expulsion of the applicant to Togo (see, *mutatis mutandis*, *Diallo v. the Czech Republic*, no. 20493/07, § 74, 23 June 2011). The applicant had further access to the Constitutional Court, which, although it could not re-examine the assessment of evidence by the Federal Asylum Office and/or the Asylum Court, could still examine an alleged breach of a constitutional right. In this context, the Court observes that as the Convention has the status of a constitutional law in Austria, the applicant would have been able to rely on the Convention guarantees even in proceedings before the Constitutional Court.

74. The Court finds that the applicant had access to sufficiently effective remedies in relation to his claims under Article 3 of the Convention. Therefore, the Court concludes that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### III. RULE 39 OF THE RULES OF COURT

75. 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 for referral under Article 43 of the Convention.

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

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the complaint concerning Article 3 admissible and the remainder of the application inadmissible;
2. *Holds* that the implementation of the applicant's expulsion to Togo would not be a violation of Article 3 of the Convention;
3. *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.

Done in English, and notified in writing on 10 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach  
Deputy Registrar

Nina Vajić  
President