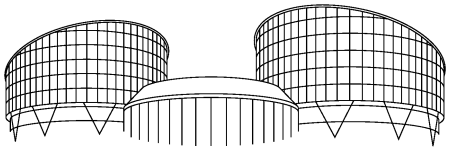

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF X v. SWITZERLAND

(Application no. 16744/14)

JUDGMENT

STRASBOURG

26 January 2017

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 X v. Switzerland,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 5 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 16744/14) 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 Sri Lankan national, Mr X ("the applicant"), on 21 February 2014. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr M. Bosonnet, a lawyer practising in Zürich. The Swiss Government ("the Government") were represented by Mr A. Scheidegger, their Deputy Agent.

3. The applicant alleged, in particular, that the Swiss authorities' failure to properly assess his asylum application and his subsequent deportation to Sri Lanka had entailed a violation of Article 3.

4. On 1 July 2015 the complaint concerning the alleged violation of Article 3 was communicated to the Government and the remainder of the application was declared inadmissible under Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr X, is a Sri Lankan national of Tamil origin, who was born in 1979 and resides in Switzerland.

6. The facts of the case, as submitted by the applicant, may be summarised as follows.

A. The applicant's first asylum proceedings and deportation

7. During the 1990s the applicant was a member of the Liberation Tigers of Tamil Eelam ("the LTTE") and participated in armed resistance against the Sri Lankan Government. In late 2003 he was detained in Colombo for about three months. The applicant stated that during this time he had been ill-treated. He furthermore stated that he had been threatened and subjected to surveillance after his release.

8. On 2 April 2007 the applicant left Sri Lanka for Italy, where he lived until May 2009. His wife, who had remained in Sri Lanka, had allegedly been subjected to searches and questioning by the Sri Lankan police and security forces. She left Sri Lanka on 13 March 2009 and joined the applicant in Italy.

9. On 25 May 2009 the applicant and his wife illegally entered Switzerland and applied for asylum on grounds of political persecution in Sri Lanka. The applicant emphasised that, as a member of the LTTE, he had participated in armed resistance against the Government of Sri Lanka and had been ill-treated in detention.

10. On 8 December 2009 the applicant's wife gave birth to their first child.

11. In a decision taken on 1 June 2011, the Federal Migration Office ("the FMO" – now the State Secretariat for Migration) held that the applicant and his wife did not fulfil the criteria necessary to obtain refugee status because they had failed to present sufficient evidence in support of their claim. Furthermore, the FMO rejected the applicant's asylum application and ordered the execution of their deportation order to Sri Lanka, finding it enforceable, legal and reasonable (*möglich als auch rechtmässig und zumutbar*).

12. On 9 June 2011 the applicant's wife gave birth to their second child.

13. On 5 July 2011 the applicant and his wife appealed against the FMO's decision to the Federal Administrative Court, requesting that it annul the deportation order according to which the authorities of the Canton of St Gallen had to deport them no later than 27 July 2011, by force if necessary (pursuant to points 3, 4, and 5 of the operative part of the FMO's decision of 1 June 2011). However, the applicant did not challenge the FMO's decision refusing to grant him asylum or to recognise him as a refugee (points 1 and 2 of the operative part of the FMO's decision of 1 June 2011).

14. In its judgment of 1 October 2012, the Federal Administrative Court rejected the applicant's appeal on the merits. The court held that the FMO had violated the applicant's right to be heard by refusing to grant him and

his wife access to certain documents in its possession, namely a country report of 22 December 2011 on the conditions in Sri Lanka, which had been established during an official mission of the FMO in September 2010. Nevertheless, since the FMO had provided the parties with access to these documents at a later date, the Federal Administrative Court concluded that the original violation had been remedied.

15. The Federal Administrative Court further held that there was no impediment to enforcing the deportation order. In particular, weighing the preponderance of the evidence (*mit beachtlicher Wahrscheinlichkeit*), it held that neither the applicant's submissions nor the official file indicated that he or his wife would be subjected to treatment contrary to Article 3 of the Convention if they returned to Sri Lanka.

16. On 2 November 2012 the applicant and his wife applied to the Federal Administrative Court to have its judgment of 1 October 2012 reconsidered. The applicant claimed that the court had not adequately considered all the relevant evidence. He also submitted a copy of an LTTE magazine cover from 1997, which included his photograph. He also submitted a letter from his sister dated 19 October 2012, as well as confirmation from the Human Rights Commission of Sri Lanka that he had lodged a complaint with that institution on 5 October 2012.

17. In its judgment of 27 November 2012, the Federal Administrative Court rejected the applicant's application for reconsideration, holding that there were insufficient grounds to reopen the case. It emphasised that the application for reconsideration was an extraordinary remedy, which could not be used to submit facts which could have been raised during the ordinary proceedings.

18. On 21 August 2013 the applicant and his family were deported to Sri Lanka. Upon arrival at the airport in Colombo, they were detained and questioned for thirteen hours. Following that, the applicant's wife and children were released, whereas the applicant was incarcerated and ill-treated in Boosa Prison. According to his wife, when she visited the applicant in prison she noted that his face appeared swollen and concluded that her husband had been beaten.

19. On 6 December 2013 a representative of the Swiss Embassy and a senior protection officer of the UNHCR visited the applicant in the prison governor's office. During this visit, the representatives noted that the applicant was visibly afraid to speak and that a free conversation with him was impossible.

20. Following this, the applicant's family was relocated to Switzerland.

21. On an unknown date the applicant was transferred to a so-called "rehabilitation" prison, from which he was released on 12 April 2015.

22. After his release, the applicant applied for a visa on humanitarian grounds to the Swiss authorities in order to return to Switzerland and submit

a fresh asylum application. On 21 April 2015 the FMO allowed the applicant to return to Switzerland and he did so on 25 April 2015.

23. On an unspecified date the applicant submitted a fresh asylum application to the Swiss authorities and on 26 June 2015 his application was granted.

B. Case of Y.

24. In his application to the Court, the applicant pointed out that in a parallel case another Tamil, Mr Y, had been deported from Switzerland to Sri Lanka on 25 July 2013, that is to say almost a month before the applicant's own deportation. According to Y's lawyer, upon his arrival in Sri Lanka he had been detained and subjected to ill-treatment which had led to his hospitalisation.

25. Furthermore, on 2 August 2013 Y's lawyer had written to the Swiss Minister of Justice and to the director of the Migration Office asking that all deportations of Tamils to Sri Lanka be suspended.

C. Subsequent investigations

26. The director of the FMO commissioned an external investigation into the expulsions of the applicant and Y. The report delivered by Prof. W. Kälin on 23 February 2014 concluded that, due to a combination of several shortcomings of the Swiss authorities, the individual risk of ill-treatment of the two Tamils in Sri Lanka had not been properly assessed.

27. In addition, the UNHCR also carried out an assessment of the decision-making process of the FMO in the applicant's case and identified a number of shortcomings. These consisted of, in particular, the prolonged lapse of time between the asylum application (May 2009) and the execution of the deportation order (August 2013); the fact that the situation in Sri Lanka had changed considerably after the end of the civil war in 2009; the involvement of several FMO employees in different phases of the decision-making process throughout an extended period of time; the fact that the applicant's hearing had been partly held in a superficial manner and that the authorities had not conducted additional investigations.

28. The results of both reports were made public on 26 May 2014.

29. On 10 December 2013 the FMO adopted an internal report on the arrest of the applicant by the Sri Lankan authorities.

D. Swiss policy on deportation of Tamils

30. After the end of the civil war in Sri Lanka, in 2011 Switzerland resumed deportations of Tamils to that country. The practice was again

stopped in September 2013, following the expulsion and ill-treatment of the applicant and Y.

31. Subsequently, the FMO analysed the situation in Sri Lanka in the light of the results of its missions to that country, the case-law of international courts, the practices of other countries and the reports of international organisations. As a consequence, the FMO has modified its practice concluding that the assessment of risk would now be carried out following criteria developed by the European Court of Human Rights in all cases involving deportations or Sri Lankan nationals.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND CASE-LAW

32. The Federal Act on liability of the Confederation, members of its authorities and its officials (*Loi fédérale sur la responsabilité de la Confédération, des membres de ses autorités et de ses fonctionnaires*, RS 170.32 – hereinafter "the Liability Act"), in so far as relevant, reads as follows:

Article 3

"[1]The State is liable for damage caused unlawfully by a civil servant in the exercise of official functions and regardless of his or her guilt ...

[3]The injured party has no recourse to the courts in respect of the civil servant in question ..."

Article 12

"Lawfulness of decisions, orders and judgments that have become final cannot be reviewed in proceedings for liability for damage."

Article 20

"[1]State liability (Art. 3 above) is extinguished if the injured party does not lodge a claim for damages ... within one year from the day he or she learned that damage had incurred and, in any event, after ten years from the commission of the disputed act by the civil servant."

33. The relevant parts of the Federal Court judgment in case BGE 119 Ib 208 read as follows *(unofficial translation)*:

"3.3 It is clear from the claim that the plaintiff considers that the alleged damage was caused by the decision of the [competent second-instance authority] of 9 August 1988, which confirmed both the decision of the [competent first-instance authority] of 26 August 1986 on his asylum application as well as the ordered deportation. The applicant submits that he was tortured during his detention in Turkey and has thereby suffered considerable damage.

a) As to the cause of the detention and alleged torture in Turkey, the removal of the plaintiff from Switzerland to Turkey on 4 April 1989 is the only consideration from

the Swiss point of view. The deportation was, in turn, the consequence of the decision in the negative of the [competent second-instance authority] of 9 August 1988.

b) Pursuant to Article 3(1) of the Liability Act, the State is liable for the damage which an official inflicts unlawfully on a third party in the exercise of his or her official duties. In the case of a fault on the part of the official, there is also the right to pecuniary compensation, provided that the seriousness of the infringement justifies it and that it has not been otherwise repaid (Article 6(2) of the Liability Act).

c) In each case, pursuant to the above provisions, the liability of the Confederation is subject to the unlawfulness of damage incurred (*die Widerrechtlichkeit der Schadenszufügung*).

In this connection, Article 12 of the Liability Act provides:

'Lawfulness of decisions, orders and judgments that have become final cannot be reviewed in proceedings for liability for damage.'

Thus, if the cause of the alleged damage is a formal legally binding decision, the [liability] claim must be dismissed without further examination of the question of the unlawfulness of the conduct of the State, pursuant to Article 12 of the Liability Act (BGE 91 I 451 E. 2; 93 I 74 cons. 4).

The purpose of this regulation is to prevent a citizen from reopening what is in his or her opinion an uncomfortable but legally binding decision or judgment by way of liability proceedings (BBl 1956 I 1401). Different cantons contain identical or similar rules, which determine the singularity of the appeal (*Einmaligheit des Instanzenzugs*)... Anyone who has unsuccessfully contested a decision as far as the court of highest instance (court or administrative authority) or who has not made use of the legal remedies available for contesting the [allegedly] injurious decision shall not be allowed to have the legality of that decision (re-)examined in liability proceedings ...

5.5 Given that the liability of the State is excluded from the decision of the [competent second-instance authority] under Article 12 of the Liability Act, the only question which remains to be answered is whether the [competent domestic authorities] in connection with the expulsion of the plaintiff to Turkey have otherwise, and beyond the formally legally binding decision, behaved in a manner that could at most be qualified as unlawful. Any omission of the competent authorities should also be taken into account, should action have been required.

a) Liability of the [State] under Article 3(1) of the Liability Act for any omission of the competent authorities would have been considered if the circumstances between the appeal decision on 9 August 1988 and the applicant's expulsion on 4 April 1989 had changed to the extent that the competent authorities should have re-evaluated the deportation decision.

Since the alleged omission to re-examine in any event concerns a legal act, the same degree of liability applies as in the case of liability for legal acts. It follows that the unlawfulness of the conduct of a judge or an official in the exercise of his or her official functions presupposes a special error which is not already present when his or her decision later proves to be incorrect, unlawful or even arbitrary. Liability-causing unlawfulness is present only if the judge or official has violated a duty essential to the performance of his or her functions ...

b) The decision as to whether a rejected asylum-seeker may be returned to his home country, or whether the non-refoulement principle laid down in Article 45 of the Asylum Act requires otherwise, entails a prognosis from the competent authorities

which should contain a careful examination of the circumstances but at the same time leave the competent authorities a certain room for manoeuvre.

The mere fact that the prognosis underlying a deportation decision on the presumed developments in the home country of a rejected asylum-seeker proves to be incorrect in the future and that the returned foreigner is persecuted in his home State contrary to the assumption of the Swiss authorities is not sufficient to justify State liability under the Liability Act. Such liability – in so far as Article 12 of the Liability Act leaves room for this – will be taken into account only in case of an inexcusable wrongful decision, for example a defect in the assessment of the case which would not have occurred under a dutiful judge or official."

34. The relevant part of the report commissioned by the FMO entitled "Asylum proceedings Sri Lanka", prepared by Prof. W. Kälin, reads as follows *(unofficial translation)*:

"5.3. Transfer of liability...

Furthermore, the question arises as to the relationship between the decision of the [first-instance authority] and the judgment of the Federal Administrative Court, in particular whether the appeal proceedings resulted in a transfer of liability.

From the point of view of Switzerland's responsibility under international law, the question is irrelevant since a breach of the principle of non-refoulement results in liability of Switzerland as a Contracting State and not of the deciding authority.

Pursuant to the Liability Act, it is the Confederation, and not a particular authority, which is liable for damage caused by its officials. In this case, the question does not arise either. It would be relevant only in the case of an extremely hypothetical internal recourse to the deliberately or grossly negligent official under Article 7 of the Liability Act, since at that point in time it would have to be decided who had caused the actual damage. It is also necessary to note Article 12 of the Liability Act, under which the legality of formal, legally-binding decisions, ordinances and judgments cannot be re-examined in proceedings for liability. In the case of the expulsion of a rejected asylum-seeker who had been arrested after his arrival and allegedly tortured in Turkey, the Federal Court held in its judgment BGE 119 Ib 208 that, following the conclusion of the appeal proceedings, the [impugned] decision had become final and was thus not amenable to review ... [The Federal Court] therefore appeared to conclude that the responsibility [lay with] the appeal authority, but pointed out further that, however, the first-instance authority could be held liable for possible omissions if the relationships between the appeal decision and the expulsion of the plaintiff had changed so much that the competent authorities would have had to reconsider the expulsion decision ... This statement can be generalised: despite a judgment of the Federal Administrative Court, liability remains with the [first-instance authority] for actions or omissions which are not covered by the finality (*Rechtskraft*) of that judgment."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicant complained that the risk of being subjected to inhuman treatment if returned to Sri Lanka had not been sufficiently taken into account by the Swiss authorities before his deportation. He alleges that after his deportation to Sri Lanka he was exposed to ill-treatment contrary to Article 3 of the Convention, which reads as follows:

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

36. The Government contested that view, arguing that the applicant could no longer claim to be the victim of a violation of Article 3.

A. The applicant's victim status

37. The Government argued that the applicant could no longer claim to be a "victim" of a violation of Article 3 of the Convention, because the Swiss authorities had acknowledged shortcomings in their assessment of his first asylum application and afforded him appropriate redress.

38. Article 34 of the Convention, in so far as relevant, provides as follows:

> "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."

39. Once the Swiss authorities became aware of the applicant's incarceration and ill-treatment in Sri Lanka, they took a number of measures aimed at remedying the damage he had suffered. On 26 May 2014 the FMO recognised, and apologised both publicly and privately for the mistakes made in assessing the applicant's first asylum application. The FMO then offered free and continued assistance to the applicant and his family: it allowed them to return to Switzerland, bore their travel expenses, provided them with free legal assistances and ultimately granted them asylum.

40. According to the Government, the measures taken by the Swiss authorities, taken as a whole, had the result of repairing the damage suffered by the applicant. Moreover, for any further redress, the applicant could have claimed compensation for the shortcomings in his first asylum proceedings under Article 3 of the Liability Act, within the deadline set by Article 20 of that Act. However, he had failed to do so.

41. In view of the above, the applicant could no longer be considered a "victim" within the meaning of Article 34 of the Convention and his application should be declared inadmissible.

42. The applicant contested the Government's assertion. First of all, he argued that he had not automatically been granted a humanitarian visa to return to Switzerland or refugee status by the Swiss authorities. Instead, he had had to apply for both the visa and for asylum, and he had obtained both statuses following the standard procedure.

43. As to the Government's allegation that he could have applied for compensation under Article 3 of the Liability Act, the applicant referred to a precedent in which in a similar case the Federal Court had rejected a claim for compensation on the grounds that, pursuant to Article 12 of the Liability Act, final decisions could not be examined in proceedings for liability. The applicant also submitted that Y had unsuccessfully claimed such compensation and that, consequently, any such claim lodged by himself would most likely have resulted in the same outcome. Moreover, the one-year deadline to submit the application for compensation set out in Article 20 of the Liability Act had expired while the applicant had been in detention and was being tortured in Sri Lanka. It had thus not been possible for him to lodge such an application. It follows that he had not lost his victim status within the meaning of Article 34 of the Convention, since he had never been afforded adequate redress for the violation suffered.

44. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question of whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII; and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V).

45. The Court further reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Gäfgen*, cited above, § 115; and *Scordino (no. 1)*, cited above, § 180).

46. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen*, cited above, § 116; and *Scordino (no. 1)*, cited above, § 186). In the context of Article 3, which ranks as one of the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from a breach should in principle be available as part of the range of possible remedies (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V; *Brincat and Others v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, § 59,

24 July 2014; and *Ciorap v. Moldova* (no. 2), no. 7481/06, §§ 24-25, 20 July 2010).

47. Turning to the present case, the Court notes that the Swiss Government, once it realised that the applicant's asylum proceedings had been flawed, that he had been wrongly expelled and that he had been subject to ill-treatment in prison in Sri Lanka, indeed took certain measures to try to repair the harm caused to him. They publicly and privately apologised for the flaws in the asylum proceedings and assisted the applicant in returning to Switzerland and applying anew for asylum. The authorities also commissioned several external and internal investigations, which concluded that the applicant's rights had been breached.

48. In these circumstances, the Court is satisfied that the foregoing measures taken together constituted an acknowledgment in substance of the violation of Article 3 of the Convention in the applicant's case (see *Gäfgen*, cited above, § 115). However, the Court considers that in the absence of any compensation for the damage suffered by the applicant, they cannot be regarded as sufficient redress. What remains to be established is whether the applicant had at his disposal other means of obtaining such redress.

49. The Government submitted in this respect that the applicant could and should have lodged a compensation claim under Article 3 of the Liability Act. It is the Court's understanding that, in doing so, the Government sought to argue that the applicant had in fact failed to exhaust an effective domestic remedy for the breach of his rights. The applicant disagreed claiming that the Federal Court's previous case-law in this respect excluded any compensation in cases similar to his (see paragraph 33 above). It is not this Court's task to speculate on the possible outcome of a compensation claim before the national authorities or the manner in which domestic courts interpret domestic law. However, in so far as the parties appear to link the issue of victim status to the more general question of existence of an effective remedy for the applicant's grievance, the Court will address this question applying *mutatis mutandis* its well-established case-law developed with respect to exhaustion of domestic remedies (see, *mutatis mutandis*, *Cocchiarella v. Italy* [GC], no. 64886/01, § 73, ECHR 2006-V).

50. In that connection the Court restates that the existence of a remedy to be exhausted before addressing the Court must be sufficiently certain not only in theory but in practice, failing which it will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014). To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success (see *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 222, ECHR 2014 (extracts)).

51. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al, § 69, ECHR 2010; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; and *Vučković and Others*, cited above, § 77).

52. Turning to the present case the Court cannot but note that the Government did not submit any domestic case-law in support of their argument that a claim for State liability would have been effective in the circumstances of the applicant's case. Instead, they relied on the conclusions of the report issued by Prof. Kälin (see paragraphs 26 and 34 above), which do not seem to support their claim of effectiveness of the remedy relied on.

53. The Court further notes that the applicant submitted domestic case-law of the Federal Court which, in a case factually similar to the applicant's, seemed to suggest that the inability to challenge final decisions and judgments excluded State liability in cases where the alleged damage was caused by such an act or its subsequent enforcement (see paragraph 33 above). The Court is thus not satisfied that the Government proved that a claim for liability against the State was an effective remedy both in theory and in practice for the applicant's grievances.

54. In addition, the Court observes that the deadline to lodge a compensation claim set out in Article 20 of the Liability Act expired while the applicant was still in prison in Sri Lanka. It considers it unrealistic to have expected the applicant to apply to the Swiss authorities for compensation for a violation of his rights while he was detained in Sri Lanka. Consequently, even if the compensation claim submitted by the Government might have been available in law, it would not appear to have been effective in practice in the circumstances of the applicant's case (see, *mutatis mutandis*, *McFarlane*, cited above, § 128; and *Orhan v. Turkey*, no. 25656/94, § 395, 18 June 2002).

55. In the light of the foregoing, the Court considers that the applicant has not received sufficient redress at domestic level and that he can still claim to be a victim of a violation of Article 3. It therefore dismisses the Government's preliminary objection.

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

B. Merits

57. The applicant complained that the shortcomings in the assessment of his first asylum claim, which led to his expulsion and subsequent ill-treatment at the hands of the Sri Lankan authorities, constituted a violation of Article 3 of the Convention, which reads as follows:

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

58. The Government recognised that the assessment of the applicant's first asylum application had been carried out incorrectly by the Swiss authorities. In this respect, the Government endorsed the two independent reviews carried out by Prof. W. Kälin and the UNHCR respectively (see paragraphs 26-27 above), which identified several shortcomings which, taken as a whole, rendered the assessment of the risk run by the applicant in respect of deportation to Sri Lanka erroneous.

59. The Court reiterates that, according to its established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among many other authorities, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012). The Court also notes that the right to political asylum is not contained in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215).

60. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 93, ECHR 2014 (extracts); *Hirsi Jamaa and Others*, cited above, § 114; and *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).

61. The assessment of the existence of a real risk must necessarily be a rigorous one (see *F.G. v. Sweden* [GC], no. 43611/11, § 113, ECHR 2016). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see, for example, *Saadi*, cited above, § 129). In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons

to believe in the existence of the practice in question and his or her membership of the group concerned, without having to demonstrate the existence of further special distinguishing features (see *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 104-105, ECHR 2016). The Court has also acknowledged that, owing to the special situation in which asylum-seekers often find themselves, it was frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof (see *F.G. v. Sweden*, cited above, § 113).

62. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal (see *Hirsi Jamaa and Others*, cited above, § 121). The Court is not precluded, however, from having regard to information which comes to light subsequent to the deportation. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I, and *Vilvarajah and Others*, cited above, § 107).

63. Turning to the circumstances of the present case, it would appear from the material in the case-file that, at the time of his deportation, the Swiss authorities should have been well aware of the risk that the applicant and his family might be subject to treatment contrary to Article 3 of the Convention if expelled to Sri Lanka. Specific evidence available to them included not only the applicant's own submissions but also the parallel case of Mr Y, who had been deported on 25 July 2013 to Sri Lanka, where he had been detained and subjected to ill-treatment resulting in his hospitalisation. Furthermore, Y's lawyer had written to the Minister of Justice and to the director of the Federal Office for Migration on 2 August 2013 asking that all deportations of Tamils to Sri Lanka be suspended. The authorities do not appear to have replied.

64. Instead, on 21 August 2013 the applicant and his family (including two small children) were deported to Sri Lanka. Upon arrival at Colombo airport, they were detained and questioned. A few weeks later, the applicant was transferred to a prison and ill-treated. He was then transferred to a "rehabilitation centre" in Sri Lanka, where he stayed until April 2015, when he was released and allowed to return to Switzerland.

65. In their observations, the Government accepted that there had been shortcomings in the assessment in the applicant's first asylum application, which had led to his expulsion to Sri Lanka, his incarceration and subsequent ill-treatment. The foregoing considerations are sufficient to enable the Court to conclude that the Swiss authorities failed to comply with their obligations under Article 3 of the Convention in dealing with the applicant's first asylum application.

66. There has accordingly been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 40,000 Swiss francs (CHF – approximately 36,900 euros (EUR)) in respect of non-pecuniary damage.

69. The Government contested that amount considering CHF 10,000 (approximately EUR 9,225) sufficient to repair any non-pecuniary damage suffered by the applicant.

70. The Court notes that, having been expelled from Switzerland and subjected to ill-treatment in his country or origin, the violation of Article 3 in the applicant's case actually materialised. He must have thus suffered fear, anguish and distress which cannot be repaired by the mere finding of a violation (see, for example, *Mannai v. Italy*, no. 9961/10, § 61, 27 March 2012). The Court thus awards the applicant EUR 30,000 in respect of non-pecuniary damage.

B. Costs and expenses

71. The applicant also claimed CHF 6,701.25 (approximately EUR 6,181) for the costs and expenses incurred before the domestic authorities and before the Court. These include about twenty-seven hours of legal work at the rate of CHF 250 per hour.

72. The Government contested that amount. In view of the fact that the applicant's legal costs had already partly been reimbursed at national level, the Government pointed out that only another CHF 4,882 (approximately EUR 4,503) were directly linked to the applicant's Article 3 complaint before the Court. They therefore proposed awarding the applicant the said amount.

73. 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 4,770 covering costs under all heads.

C. Default interest

74. 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 there has been a violation of Article 3 of the Convention;

3. *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, the following amounts, to be converted into Swiss francs at the rate applicable at the date of settlement:
      (i) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,770 (four thousand seven hundred and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Luis López Guerra
Deputy Registrar	President