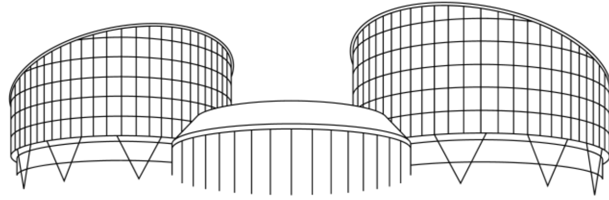

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF H.N. v. SWEDEN

(Application no. 30720/09)

JUDGMENT

STRASBOURG

15 May 2012

FINAL

17/12/2012

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

In the case of H.N. v. Sweden**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 30720/09) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Burundian national, Mr H.N. ("the applicant"), on 11 June 2009. The President of the Third Section granted the applicant anonymity (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Ms A. Sjunghamn, a lawyer practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr B. Sjöberg, of the Ministry for Foreign Affairs.

3. The applicant alleged that his deportation to Burundi would entail the risk of being killed, in violation of Article 2 of the Convention, or of being subjected to treatment in breach of Article 3.

4. On 30 June 2009 the President of the Third Section decided to apply Rule 39, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be deported to Burundi until further notice.

5. On 21 September 2009 the President of the Third Section decided to give notice of the application to the Government.

6. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and the present application was assigned to the newly composed Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1984.

8. On 19 September 2006 the applicant arrived in Sweden. He applied for asylum the following day. He stated, in interviews and written submissions, that he is of mixed Tutsi/Hutu ethnicity and that his mother and younger brother had been killed in 1997 during ethnic violence. Following the victory in the 2005 general elections by CNDD-FDD (*Conseil National pour la Défense de la Démocratie – Forces de Défense de la Démocratie*), that party had set out to imprison and assassinate people suspected of being members of Palipehutu-FNL (*Parti pour la Libération du Peuple Hutu – Forces Nationales de Libération*) and other organisations hostile to CNDD-FDD. He claimed that he and his family had been threatened and harassed on several occasions, being accused of collaborating with the FNL group. On 5 August 2006 CNDD-FDD supporters had come to the family's home and had killed the applicant's father and arrested the applicant. He had then been detained for a month, during which time he had been beaten and tortured daily. A return to Burundi would entail the risk of renewed detention and torture as well as death, as he would be able to give evidence about what had happened to his family.

9. On 26 July 2007 the Migration Board (*Migrationsverket*) rejected his application. It stated that the general situation in Burundi, due to recent improvements, was not a sufficient ground for asylum. It further considered that the events alleged by the applicant had to be seen as acts of individual soldiers which did not constitute persecution by the Burundian authorities. Moreover, the applicant had not shown that the authorities were unwilling or unable to protect him from such crimes. The Board also considered that the situation in Burundi had changed since August 2006 and that there was no evidence that the applicant would any longer be of interest to the authorities or the FNL. Thus, he had not made plausible that there was a real risk of ill-treatment upon return.

10. The applicant appealed to the Migration Court (*Migrationsdomstolen*) in Stockholm. He submitted a search warrant dated 10 September 2006, purportedly issued by the Burundian intelligence service (*Service National des Renseignements*), which had allegedly been given to a friend of his father and forwarded to the applicant by that friend's wife. He further submitted a death certificate concerning his father issued by a hospital in Burundi. At the oral hearing before the court, he claimed that he had not been politically active in Burundi but had been involved in an organisation working for peace. He further stated that a guard had helped him to flee from detention. Then his father's friend had contacted a man

who had taken him out of the country. His father's friend had subsequently been arrested.

11. On 4 April 2008 the court rejected the appeal. It noted that the applicant had not proved his identity. Moreover, it found that his explanation how he had come into possession of the above-mentioned documents of the security police and the hospital was peculiar. In these circumstances, the court considered that the documents had a low value as evidence. It further called into question the applicant's account on how he had been able to flee the prison and then leave the country without himself showing identity papers en route. Thus, in general, the applicant was not credible. As to the alleged risks facing him in Burundi, the court noted that he had not been politically active or otherwise active in seeking justice for the alleged crimes against his family. It therefore questioned that the Burundian authorities would have any particular interest in him.

12. Following the applicant's further appeal, on 26 June 2008 the Migration Court of Appeal (*Migrationsöverdomstolen*) refused him leave to appeal.

13. On three subsequent occasions, the applicant claimed that there were impediments to his deportation and requested that his application for a residence permit be examined anew. In support of the second of these applications, he submitted a birth certificate and other documents to prove his identity. He further stated that he had been the deputy head of the youth section of MIPAREC (*Ministère pour la Paix et la Reconsiliation*), a Christian organisation working for peace and reconciliation in Burundi. Because of his membership in MIPAREC and also due to his having refused to join the FNL, the latter organisation had tried to kill him several times and had also extorted food and money from his family. Moreover, in August 2008, the applicant had been informed that his remaining four siblings, who had been abducted by CNDD-FDD members on 5 August 2006, had been found murdered. Previously, he had not known of their fate.

14. By decisions of 16 December 2008 and 5 February 2009, the Migration Board found that the applicant's new submissions were just additions or modifications of circumstances already alleged which could neither qualify as impediments to deportation or reasons to examine his asylum application anew.

15. In his third application for a new examination, the applicant added that he had been politically active in Sweden, having organised and participated in several demonstrations against the government of Burundi. He had also received telephone calls from an unknown person, who had stated that the Burundian government knew of these activities and would kill him upon return to the country.

16. On 16 June 2009 the Migration Board did not find that the applicant had made it plausible that he would risk persecution in Burundi on account of *sur place* activities in Sweden. Thus, no new circumstances constituting

an impediment to his deportation had been adduced. Nor were there reasons to re-examine the question of a residence permit.

17. The applicant's appeals against the Migration Board's decisions of 16 December 2008 and 5 February 2009 were rejected by the Migration Court. It appears that the applicant did not appeal against the Board's decision of 16 June 2009.

18. On 30 June 2009, following the Court's decision under Rule 39 of the Rules of Court (see paragraph 4 above), the Migration Board decided to stay the applicant's deportation until further notice.

II. RELEVANT DOMESTIC LAW

19. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as "the 2005 Act").

20. An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (Chapter 5, section 1 of the 2005 Act). The term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Chapter 4, section 1). This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

21. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) to allow him or her to remain in Sweden (Chapter 5, section 6). Special consideration should be given, *inter alia*, to the alien's health status. According to the preparatory works (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

22. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special

provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

23. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This is the case where new circumstances have emerged which indicate that there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced (Chapter 12, section 18). If a residence permit cannot be granted under this criteria, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, section 19).

24. Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal (Chapter 14, section 3, and Chapter 16, section 9).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

25. The applicant complained that, if deported to Burundi, he would risk imprisonment, torture and death. He relied on Articles 2 and 3 of the Convention, which read as follows:

Article 2:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3:

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

26. The Government contested that argument.

A. Admissibility

27. 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

28. The applicant maintained the claims that he had presented in the Swedish proceedings. He had described, in the best possible way, the persecution and abuse to which his family had been subjected, including the attack in 2006, and his own imprisonment and subsequent escape. It was normal for a person in his situation to have repressed certain details and there was nothing remarkable about the fact that a prison guard had helped him to flee. He had presented a statement by MIPAREC to the effect that he had been imprisoned and tortured. No further proof could be obtained from Burundian authorities. Further, as asylum seekers only had a limited right to medical care in Sweden and as he had not had the financial means to consult a doctor himself, he had not been able to obtain documentation on his injuries.

29. The applicant further pointed out that, while he had mentioned his membership in MIPAREC late in the domestic proceedings, he had stated early on that he had been working for a peace organisation. Similarly, while not specifically expressing that he risked persecution by the FNL in his original asylum application, he had stated that the FNL had extorted food and money from his family. As regards his late claim concerning political activities in Sweden, the applicant submitted that the reason was that these activities had indeed taken place at a late stage of the proceedings when his political awareness had developed.

30. The Government agreed with the national authorities that the applicant was not credible. They submitted that the details given by him regarding the persecution to which he claimed that he and his family had been subjected were vague or non-existent. In particular, he had not been able to name or in any other way describe the attackers who had allegedly come to his family’s home in 2006. Nor had he described the conditions during the subsequent imprisonment or explained why a prison guard would help him to flee. Further, the Government pointed out that he had not been

able to present any documentation showing mistreatment or torture in prison, although he had claimed to have been tortured daily for a month and had soon thereafter fled to Sweden, where all asylum seekers were offered a health examination upon arrival.

31. The Government further submitted that the applicant had invoked new and vital circumstances at a very late stage of the asylum proceedings, including his membership in MIPAREC and the alleged risk of persecution by the FNL. No explanation had been given as to why this information had not been presented at the start of the asylum proceedings. They also questioned the claim that he had been politically active after his arrival in Sweden, as he had not been politically active in Burundi and as the claim was presented very late and without substantiation.

32. The Court finds that the issues under Articles 2 and 3 of the Convention are indissociable and it will therefore examine them together.

33. The Court reiterates that 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, for example, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67; and *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42). However, the expulsion of an alien 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 in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

34. 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 v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to

obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

35. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). 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 would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). In this respect, the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is 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. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

36. The above principles apply also in regard to Article 2 of the Convention (see, for example, *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

37. In cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations (see *N.A. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

38. Whilst being aware of reports of serious human rights violations in Burundi, the Court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to return to that country (see, for example, *I.N. v. Sweden* (dec.), 1334/09, 15 September 2009; *E.N. v. Sweden* (dec.), 15009/09, 8 December 2009; and *Muco v. Sweden* (dec.), 31243/09, 4 January 2012). The Court has to establish whether the applicant's personal situation is such that his return to Burundi would contravene the relevant provisions of the Convention.

39. The Court first notes that the applicant was heard by both the Migration Board and the Migration Court, that his claims were carefully

examined by these instances and that they delivered decisions containing extensive reasons for their conclusions.

40. The Court finds, in agreement with the Swedish authorities, that there are credibility issues with regard to the applicant's statements. Notably, his claims escalated considerably during the domestic proceedings. For instance, it was not until after the original asylum proceedings had been finalised that the applicant stated that the peace organisation in which he had been involved was MIPAREC and that he had been the deputy head of its youth section. At the same time, he also claimed for the first time that not only CNDD-FDD but also the FNL group were threatening his life. Also, only two years after his siblings' abduction had he been informed that they had been killed. Moreover, many of the applicants statements are vague and lacking in detail. Had he been subjected to the events alleged, it would be reasonable to assume that he could provide more specific information. In particular, the Court finds it remarkable that, although the applicant had escaped from prison, where he had allegedly been tortured on a daily basis for a month, just about two weeks before his arrival in Sweden, he apparently made no attempt to draw the migration authorities' attention to possible injuries, for instance by undergoing an initial health examination.

41. The Court further notes that the applicant has not been politically active in Burundi and that his claimed activities in Sweden have been of a rather limited nature.

42. Having regard to the above, the Court must conclude that the applicant has failed to make it plausible that he would face a real risk of being killed or subjected to ill-treatment upon return to Burundi. Consequently, his deportation to that country would not involve a violation of Article 2 or 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

43. The applicant further appeared to complain that he did not have a fair hearing in the proceedings in Sweden. He relied on Articles 6 and 13 of the Convention.

44. The Court reiterates that Article 6 of the Convention does not apply to asylum proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X). Consequently, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected as inadmissible pursuant to Article 35 § 4.

45. Furthermore, the applicant's allegations were examined by the Migration Board and, following his appeal, by the Migration Court. Accordingly, he had an effective remedy within the meaning of Article 13

of the Convention. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected as inadmissible pursuant to Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Articles 2 and 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that the applicant's deportation to Burundi would not involve a violation of Article 2 or 3 of the Convention.

Done in English, and notified in writing on 15 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President