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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 972/2019*, **

Communication submitted by:	B.T.M. (represented by counsel, Centre suisse pour la défense des droits des migrants)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	22 November 2019 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 25 November 2019 (not issued in document form)
Date of adoption of decision:	11 November 2022
Subject matter:	Deportation to Zimbabwe
Procedural issues:	None
Substantive issue:	Risk of torture or other cruel, inhuman or degrading treatment if deported to country of origin
Articles of the Convention:	3 and 16

* Adopted by the Committee at its seventy-fifth session (31 October–25 November 2022).

** The following members of the Committee participated in the examination of the communication: Todd Buchwald, Claude Heller, Erdogan Iscan, Liu Huawen, Maeda Naoko, Ilvija Pūce, Ana Racu, Abderrazak Rouwane and Bakhtiyar Tuzmukhamedov.

1.1 The complainant is B.T.M.,[1] a national of Zimbabwe, born on 1 December 1993. He filed an application for asylum in Switzerland on 22 July 2019. His application was rejected on 30 August 2019. The complainant then filed an appeal with the Federal Administrative Court, which was also rejected, on 27 September 2019. The complainant is therefore facing deportation to Zimbabwe and considers that his removal would constitute a violation by the State party of articles 3 and 16 of the Convention. He fears that he would be at real risk of torture and cruel, inhuman or degrading treatment if he were to be placed in detention following his deportation to Zimbabwe. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 2 December 1986. The complainant is represented by counsel from the Centre suisse pour la défense des droits des migrants.

1.2 On 25 November 2019, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainant to Zimbabwe while his complaint was being considered. On 26 November 2019, Switzerland accepted the request not to take any steps to deport the complainant.

Facts as submitted by the complainant

2.1 The complainant was born on 1 December 1993 in Masvingo, Zimbabwe. He studied law at Midlands State University and got his degree at the end of 2017. After graduation, he worked in Bulawayo.

2.2 The complainant then joined the Gundu, Dube and Pamacheche law firm in Gweru, where he worked under the main partner Brian Dube, a Member of Parliament representing the Gweru Urban constituency for the Movement for Democratic Change opposition party. Mr. Dube is also a well-known human rights defender and part of the leadership for legal affairs of the Movement.

2.3 At this law firm, the complainant worked on human rights-related cases. Between January and February 2019, he represented Movement for Democratic Change activists[2] who had organized demonstrations, in particular against fuel price increases, which were severely suppressed by the Zimbabwean authorities, under the Government formed by the Zimbabwe African National Union – Patriotic Front (ZANU-PF). These incidents were condemned internationally and led to the visit of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, who noted extremely disturbing reports of excessive, disproportionate and lethal use of force against protesters and mass arbitrary arrests and torture.

2.4 In this context, the complainant personally handled approximately 30 cases of persons accused of criminal offences following the demonstrations of January 2019. He also worked on 10 more very high-profile cases with his manager, Mr. Dube,[3] and his colleague, Mr. Davira. These cases related to parliamentarians. The criminal charges against his clients were politically motivated, and the complainant was able to obtain an acquittal in many cases. During the trials, he presented evidence, including video recordings of the widespread police brutality which had taken place during the suppression of the demonstrations. The evidence included images of the physical injuries inflicted on the protesters, proving the indiscriminate nature of the police and army attacks.

2.5 In January 2019, not long after the start of the judicial proceedings, the complainant began to receive threatening text messages from several unknown telephone numbers. The content of the messages was always very similar, which shows that they were either coordinated or came from the same source. The messages said things like “no one who opposed the Government has ever survived” and that it would be wise “not to be involved in

[1] The complainant has requested anonymity.

[2] At his two hearings before the Swiss authorities, the complainant declared that he was a member of the Movement for Democratic Change and had worked as a lawyer in Zimbabwe at a law firm defending opponents of the regime. In support of his application, he submitted his passport, a professional identification card, a copy of a Movement for Democratic Change card, a copy of an arrest warrant, a copy of a medical certificate and a copy of an online newspaper article.

[3] The complainant’s legal representation was confirmed by Mr. Dube’s affidavit.

representing criminals who took part in the demonstrations". Lawyers in other provinces received similar threats.

2.6 Around 29 March 2019, the complainant was physically assaulted by three strangers who were waiting not far from his home. They told him that he had already been "duly warned". One of them was wearing a ZANU-PF shirt. They knocked him down and punched and kicked him before leaving. The complainant reported this incident to the police, who refused to investigate on the pretext that he was not able to identify his assailants. The complainant also sought medical treatment for his injuries.[4]

2.7 In June 2019, the complainant escaped an attempted kidnapping by strangers who accosted him in the street and tried to force him to get into a car. After this attempted kidnapping, he lived in constant fear for his life. At around the same time, the Gweru police telephoned him and summoned him for an interview. He refused to attend because the police officer in charge was unable to provide a legitimate explanation for doing so, instead simply stating "you will see when you get here".

2.8 Fearing for his life, the complainant left Zimbabwe. To reduce the risk of being detected by the authorities, he crossed the border at Beitbridge on 19 July 2019 and took a flight to Zurich, Switzerland, from Johannesburg, South Africa.

2.9 The complainant arrived in Switzerland on 21 July 2019. On 22 July 2019, he applied for asylum in Switzerland. On 30 August 2019, the State Secretariat for Migration rejected the complainant's asylum application and ordered his deportation to Zimbabwe, on the basis that he was not able to make a credible case for his fear of persecution because he did not appear to play an important role in the Movement for Democratic Change and his statement on the subject was "vague". Moreover, the State Secretariat found that, because he had left the country by boarding a flight in Harare, his claim to be wanted by the Zimbabwean authorities was not credible.[5] Lastly, the State Secretariat rejected out of hand the documentary evidence he had submitted, including: (a) the arrest warrant because it was a document that could easily be falsified;[6] (b) the medical file he had submitted as proof of the assault because it did not constitute prima facie evidence that the assault was politically motivated; and (c) the newspaper article about the assault of his manager Mr. Dube at a public court hearing, because it allegedly had no connection to his asylum application.

2.10 On 9 September 2019, the complainant lodged an appeal with the Federal Administrative Court, invoking multiple due process violations, including a violation of the right to be heard. The complainant submitted that the State Secretariat for Migration had not properly established the facts and had rejected the documentary evidence without taking the necessary steps to verify its authenticity or relevance to the procedure.

2.11 More specifically, the State Secretariat for Migration had focused almost exclusively on the complainant's statement about his political activities on behalf of the Movement for Democratic Change, even though the persecution he was alleging in fact resulted primarily from his professional activities defending victims of State violence. The State Secretariat's unfavourable conclusion on credibility was based on a factual error regarding the way in which he had left his country of origin. The State Secretariat did not review the many items of documentary evidence on the grounds that such documents were "easily falsifiable", but did not take the necessary and reasonable steps to verify their authenticity. These steps could have included a request for the Embassy of Switzerland in Harare to investigate the authenticity of the document. In support of this claim, the complainant refers to the established case law of the Federal Administrative Court, which "holds that in this type of situation the duty to investigate the State Secretariat for Migration requires it also to use appropriate methods of investigation, such as diplomatic channels, to clarify various points of great significance to the outcome of the case".[7]

[4] A copy of the medical certificate is included in the case file.

[5] The complainant notes that he had left by the land border at Beitbridge specifically in order to reduce his risk of being detected.

[6] The State Secretariat noted that, since such documents are easily falsifiable, they have limited if any probative value.

[7] Federal Administrative Court, case E-1270/2019, judgment of 6 June 2019, para. 4.3.

2.12 On 27 September 2019, the Federal Administrative Court rejected the complainant's appeal as manifestly unfounded. In a summarily reasoned single-judge decision, without the usual exchange of written submissions, the Court followed the arguments of the State Secretariat for Migration in all respects.

2.13 Subsequently, under pressure from the State Secretariat for Migration, the complainant agreed to an assisted voluntary return plan for his repatriation to Zimbabwe, judging that it was the safest option for him. According to him, the Zimbabwean authorities were less likely to notice his return if he left Switzerland by ordinary means. The option of a forced deportation would necessarily attract the attention of the authorities, through their embassy in Switzerland, to his status as a failed asylum-seeker and returnee. This scenario would considerably increase his risk of arrest immediately upon return to Zimbabwe. However, the complainant is still facing the same level of persecution in Zimbabwe.

2.14 The complainant draws the Committee's attention to the fact that in case *N.A. v. Finland*,[8] the European Court of Human Rights found that the voluntary return of a person subject to a final deportation measure did not constitute an obstacle to the admissibility of a complaint under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). According to the Court, such a departure cannot properly be considered voluntary: "The Court sees no reason to doubt that [the complainant] would not have returned [to Iraq] under the scheme of 'assisted voluntary return' had it not been for the enforceable removal order issued against him. Consequently, his departure was not 'voluntary' in terms of his free choice."[9]

2.15 On 13 November 2019, the complainant's lawyers filed an application for re-examination with the State Secretariat for Migration, together with a request for suspensive effect. The application was based on additional evidence in the form of a letter from Mr. Dube,[10] the complainant's former employer, stating, inter alia, that:

> The complainant is a member of the legal team who was harassed and persecuted for having represented pro-democracy activists in January 2019. On one of these occasions, he was violently beaten and had to sleep at my house out of fear for his life. There is no doubt that these attacks were purely politically motivated, since it was no coincidence that he was attacked after he and another member of his law firm had been publicly exposed for having taken on these cases.

2.16 On 20 November 2019, the State Secretariat for Migration rejected the complainant's application for re-examination, considering that the new evidence submitted by the complainant was a letter of convenience and had little probative value. The complainant recalls that the document in question was a letter from Mr. Dube, an eminent Member of Parliament of Zimbabwe, who is his former employer. Mr. Dube confirmed that the complainant had worked on politically sensitive cases, which had made him a direct target of the Zimbabwean Government. His letter gives every indication of being reliable and supports the complainant's account. It should not have been rejected out of hand as unreliable without further investigation by the Swiss authorities.

2.17 According to the complainant, an appeal against the decision of the State Secretariat for Migration of 20 November 2019 would not constitute an effective remedy because its suspensive effect is not automatic and is highly unlikely to be granted by the Federal Administrative Court. In any case, a request for re-examination is a discretionary remedy, which does not need to be exhausted for the purposes of admissibility of an individual complaint before the Committee.

Complaint

3.1 The complainant claims that he is at risk of being subjected to torture or cruel, inhuman or degrading treatment if he is returned to Zimbabwe, as he was physically assaulted by three strangers and has been wanted by the authorities since 2 August 2019. As a lawyer,

[8] European Court of Human Rights, *N.A. v. Finland*, application No. 25244/18, judgment of 14 November 2019, para. 57.

[9] Ibid.

[10] A copy of the letter is included in the case file.

he represented victims of State violence and members of the Movement for Democratic Change, a political opposition party, which increases the risk he faces.

3.2 The complainant considers that his return would constitute a violation by the State party of its obligations under articles 3 and 16 of the Convention. In situations in which the complainant has met the requirement to demonstrate the existence of a real risk, it is for the Government to dispel any doubt as to that risk.[11]

3.3 The complainant's situation is similar to that in the case *M.A. v. Switzerland*:[12] both the State Secretariat for Migration and the Federal Administrative Court have rejected all the documents he submitted for the general reason of non-relevance, as the documents in question can "easily be falsified". In his appeal to the Federal Administrative Court, the complainant made an express request for the authenticity of the arrest warrant showing that he was wanted for criminal charges of "undermining authority of or insulting President", as defined in article 33 of the Criminal Law (Codification and Reform) Act, to be established by an investigation of the Embassy of Switzerland in Harare. He referred to the relevant precedent of the Court. His requests were ignored. The complainant once again requested an authentication procedure as part of his application for re-examination of 13 November 2019, following which he received no response from the Swiss authorities.

3.4 Moreover, if the Court had not adopted an accelerated single-judge procedure for the appeal, the complainant would have been able to provide explanations about several of the concerns raised by the Court regarding the authenticity of the "request for remand" document.

3.5 Such explanations include the complainant's claim that this is a document that provides the legal basis allowing the prosecution authorities to oblige the designated person to answer specified criminal charges, including by reporting to the police for an interview upon request. The complainant also refers to the decision of the Federal Administrative Court of 27 September 2019 to adopt a single-judge appeal procedure under article 111 (e) of the Asylum Act of 26 June 1998, pointing out that this provision is intended for appeals deemed manifestly unfounded after only a summary consideration by the Court. The complainant is of the view that the consideration of his arguments and evidence was by definition summary and thus in violation of the State party's procedural obligations under article 3 of the Convention.

3.6 Lastly, the complainant refers to various reports on the situation in Zimbabwe, stating that President Mnangagwa's term has been marked by a "systematic and brutal crackdown on human rights". He adds that demonstrations are violently suppressed and that anyone who dares to criticize the Government is mercilessly persecuted. Zimbabwe is increasingly limiting and criminalizing the rights to freedom of expression and of peaceful assembly and association.

State party's observations on admissibility and the merits

4.1 On 12 June 2020, the State party submitted its observations on the admissibility and merits. Firstly, the State party recalled the content of the communication and the course of the domestic proceedings.

4.2 The complainant is a national of Zimbabwe. As he did before the national courts, he is claiming that he would face torture if returned to his country of origin. On 22 July 2019, the complainant filed an asylum application with the State Secretariat for Migration. After conducting two hearings with him in person, the State Secretariat rejected the application in a decision of 30 August 2019. It found that the complainant's account of his responsibilities and role in the Movement for Democratic Change was vague and general, and the reasons for which he reported being assaulted by persons close to ZANU-PF party were superficial. It also noted the lack of an official summons or arrest of the complainant owing to his membership of a political opposition party. The State Secretariat considered an arrest warrant against the complainant unreliable for two reasons. Firstly, such documents are addressed to

[11] *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.7.

[12] European Court of Human Rights, *M.A. v. Switzerland*, application No. 52589/13, judgment of 18 November 2014.

police stations and the complainant did not explain how an original copy came to be in the personal possession of his girlfriend. Secondly, the version submitted was a poor-quality copy.

4.3 The complainant, represented by counsel, appealed against the decision of the State Secretariat for Migration on 9 September 2019. The Federal Administrative Court rejected this appeal by a judgment handed down on 27 September 2019. It reviewed, among other things, the various criticisms of the way in which the State Secretariat had established the facts. The circumstances in which an arrest warrant against the complainant had been obtained justified the dismissal of that document by the State Secretariat. The Court also rebutted the complainant's claim that the State Secretariat had not properly assessed his activities. The Court accepted that the State Secretariat had erred in noting that the complainant had left his country from Harare airport, but found that the fact that he had actually left through the Beitbridge border checkpoint to reach South Africa overland before continuing his journey by air was not relevant. What mattered was that the complainant had left his country in a non-clandestine manner without hindrance, which is a strong indication that he was not wanted. The Court also considered the nature of the complainant's political activities in the light of his own statements made during the hearings before finding that they were limited and that his connection with the Movement for Democratic Change was purely in the exercise of his professional activities.

4.4 On 13 November 2019, the complainant, represented by counsel, filed a request for re-examination with the State Secretariat for Migration. In its decision of 20 November 2019, rejecting the application, the State Secretariat noted that the supporting evidence submitted with the request was not likely to change its findings in the asylum procedure, which the Federal Administrative Court had confirmed in its judgment of 27 September 2019. On 20 December 2019, the complainant, represented by counsel, lodged an appeal with the Federal Administrative Court against the State Secretariat's decision. In it, he requested both the reinstatement of suspensive effect and free legal aid. On the substance, he argued that the duty to investigate with respect to the arrest warrant against him had been violated. According to him, the risk of persecution was established by various affidavits, including one from his former employer in Zimbabwe, and by his statements during the hearings.

4.5 On 9 January 2020, the Federal Administrative Court handed down an initial interim ruling. It noted that the new evidence – letters from the complainant's former employer, a journalist and the complainant's girlfriend – contained no new facts and that, prima facie, the appeal had no prospect of success. It therefore decided not to reinstate suspensive effect and rejected the request for free legal aid. Following an application for re-examination of 15 January 2020, which mentioned, inter alia, the arrest warrant against the complainant, on 16 January 2020 the Court upheld its interim ruling of 9 January 2020, recalling that the arrest warrant had been reviewed as part of the asylum procedure and that it would not consider the appeal on the merits unless the advance payment of fees was received by the specified deadline. On 31 January 2020, since the advance payment of fees had not been received, the Court decided not to consider the appeal on the merits.

4.6 In his complaint, the complainant claims that articles 3 and 16 of the Convention have been violated based on procedural defects, namely that neither the State Secretariat for Migration nor the Federal Administrative Court responded to his request of 2 August 2019 to verify the authenticity of the arrest warrant, that the Court, in its judgment of 27 September 2019, had carried out only a summary review of the case and that he was still wanted by the authorities of Zimbabwe owing to his activities as a lawyer.

4.7 Regarding admissibility, the State party is of the view that the complainant has not exhausted all the domestic remedies available to him.[13] The complainant argued to the Committee that the appeal to the Federal Administrative Court against the decision of the State Secretariat for Migration of 20 November 2019, which he nonetheless chose to file, would not constitute an effective remedy because it would not have automatic suspensive effect.

[13] *A.K. v. Switzerland* (CAT/C/36/D/248/2004/Rev.1), para. 7.2.

4.8 The State party recalls that it should have the opportunity to examine new evidence before the communication is submitted for consideration under article 22 of the Convention.[14] In line with the Committee's practice, the principle of exhaustion of domestic remedies also implies that the complainant must keep the competent national authorities apprised of any new information that arises after the final rejection of the asylum application.[15]

4.9 The State party also recalls the Committee's practice whereby the illusory nature of remedies is, in general, not considered if the complainant has furnished no evidence that they would be unlikely to succeed.[16] The Committee has previously noted that, in principle, it is not within the scope of its competence to evaluate the prospects of success of domestic remedies, but only whether they are proper remedies for the determination of the author's claims.[17] In keeping with the Committee's practice, a remedy is shown not to be proper when it has no suspensive effect[18] or when the cost of the procedure is too high.[19]

4.10 Applications for re-examination as an extraordinary remedy for the presentation of new facts are governed by article 111 (b) of the Asylum Act, paragraph 3 of which states that the competent authority to handle such applications, the State Secretariat for Migration, may decide to grant suspensive effect to the application for re-examination. In any event, the decision to suspend the enforcement of an expulsion or to classify an appeal as a new asylum application is taken following an individual review of the case. Part of that review concerns the risk of treatment contrary to article 3 of the Convention in the event of expulsion. The same guarantees apply to the procedure for appeal before the Federal Administrative Court under article 55 (para. 3) of the Federal Act on Administrative Procedure of 20 December 1968, under which "the appellate authority, its president or the instructing judge may reinstate the suspensive effect revoked by the lower instance; an application for the reinstatement of the suspensive effect must be decided immediately". Appeals against decisions on applications for re-examination, as for all asylum-related decisions, may be lodged with the Court. Such appeals constitute ordinary remedies. In other words, the Court must examine any appeal on the merits as long as the admissibility conditions are met. If the appeal is admitted, the Court rules on the case itself or, exceptionally, refers it back to the State Secretariat for Migration with binding instructions. This remedy is therefore indisputably capable of providing the complainant with effective redress.

4.11 Moreover, any persons who consider themselves unable to pay their counsel's fees or bear the procedural costs may apply for free legal aid.[20] The State party also recalls that the Federal Administrative Court may, in exceptional cases, fully remit the procedural costs normally borne by the unsuccessful party.[21] In any case, the question as to whether an appellant is destitute for the purpose of being granted legal aid or whether the costs of the proceedings might be waived on an exceptional basis is to be decided by the judge and not by the complainant. In the present case, both the State Secretariat for Migration and the Court addressed the possibility of granting suspensive effect to the application for re-examination in the light of the information provided by the complainant. The argument based on the lack of suspensive effect is thus unconvincing. Since the complainant is claiming that the application for re-examination is a discretionary remedy which he is not obliged to exhaust, it should be recalled that, according to the Committee's practice, the complainant must keep the competent national authorities apprised of any new information that arises after the final rejection of the asylum application. Moreover, applications for re-examination are provided for by national law, formalized and subject to appeal. Thus, they do not constitute a discretionary or ineffective remedy.

4.12 The State party adds that the complainant filed not only an application for re-examination but also an appeal with the Federal Administrative Court, despite his claim that

[14] *A.E. v. Switzerland* (CAT/C/14/D/24/1995).
[15] *X. v. Switzerland* (CAT/C/70/D/704/2015), para. 8.3.
[16] *R.K. v. Canada* (CAT/C/19/D/42/1996), para. 7.2.
[17] *M.A. v. Canada* (CAT/C/14/D/22/1995), para. 4.
[18] *Arana v. France* (CAT/C/23/D/63/1997), para. 6.1.
[19] *A.E. v. Switzerland*, cited above, para. 3.
[20] Switzerland, Federal Act on Administrative Procedure, 172.021, 20 December 1968, art. 65.
[21] Ibid., art. 63 (1)

such an appeal does not constitute an effective remedy. The interim rulings on the appeal's prospect of success and the advance payment of fees were made by the single Federal Administrative Court judge responsible for the investigation phase. If the fees are paid in advance, the judgment on the merits can be handed down by the single judge, provided that a second judge concurs.[22] Failing such agreement, the judgment on the merits is handed down by a panel of three judges.[23] Thus, the interim ruling is without prejudice to the judgment on the merits. However, the complainant did not exercise due diligence in pursuit of the available remedy, as he failed to pay the procedural costs. Moreover, it is not apparent from the file that the requirement to pay costs in advance prevented the complainant, owing to the amount of the costs, from exhausting this remedy.[24] In the light of the foregoing, the complainant has failed to exhaust the available domestic remedies and his complaint should therefore be found inadmissible.

4.13 Regarding article 3 of the Convention, the State party maintains that the Committee set out the practical application of this provision in paragraphs 38 et seq. of its general comment No. 4 (2017), which provide that complainants must prove that they face a foreseeable, present, personal and real risk of being subjected to torture if deported to their country of origin. Moreover, the existence of such a risk must appear substantial, which is the case when the relevant claims are based on credible facts. In principle, the burden of proof therefore lies with the complainant, who must present an arguable case, that is, submit substantiated arguments showing that such a risk exists.

4.14 Paragraph 49 of the Committee's general comment No. 4 (2017) sets out the information that should be taken into account in determining whether there is such a risk. Regarding evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned, the State party submits that Zimbabwe is not in a situation of war, civil war or widespread violence throughout its territory that would automatically make it possible to assume – regardless of the circumstances of the case – that real danger would be faced. The aim of such a determination is, however, to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she was expelled.[25]

4.15 Regarding allegations of torture or ill-treatment in the recent past, and the existence of, and access to, evidence from independent sources to support such claims, the State party considers that any torture or ill-treatment to which the complainant might have been subjected in the past is one of the factors that must be taken into account when assessing the risk that the person concerned would be subjected to torture or ill-treatment again if returned to his or her country.[26] According to the letter from his former employer dated 9 October 2019, the complainant was seriously assaulted in January 2019. According to his own statements, he was attacked, beaten and threatened by strangers on 29 March 2019. However, the related medical report, which was considered by the State Secretariat for Migration in its decision of 30 August 2019, does not make it possible to draw conclusions about the severity or cause of the injuries or the persons who caused them.

4.16 Another factor that should be taken into account to assess the risk for complainants of being subjected to torture if returned to their country is whether they have engaged in political activities within or outside their State of origin.[27] The complainant has essentially worked as a lawyer in the firm of his former employer, a Member of Parliament representing the Movement for Democratic Change. In his submission to the Committee, he is no longer claiming to have conducted political activities himself. The activities he mentioned during the asylum procedure were thoroughly reviewed by both the State Secretariat for Migration and the Federal Administrative Court.

[22] Switzerland, Asylum Act, 142.31, 26 June 1998, art. 111 (e).

[23] Switzerland, Federal Administrative Court Act, 173.32, 17 June 2005, art. 21 (1); and Switzerland, Asylum Act, 142.31, 26 June 1998, art. 105.

[24] *X. v. Switzerland*, para. 8.3.

[25] *A.M. v. Switzerland* (CAT/C/65/D/841/2017), para. 7.3.

[26] General comment No. 4 (2017), para. 49 (b), (c) and (d).

[27] General comment No. 4 (2017), para. 49 (f).

4.17 In addition, the State party highlights the factual inconsistencies in the complainant's statements and the fact that the authorities have called his credibility into question. An allegation is insufficiently substantiated when, on an essential point, precise and detailed information is lacking, which proves that the complainant has not experienced the events described. Likewise, an allegation is implausible when, on an essential point, it is contrary to logic or general experience. The State Secretariat for Migration and the Federal Administrative Court assessed the grounds for asylum in their decisions and judgments and rejected them for the reasons outlined below. Since the complainant is accusing the Swiss authorities of not having given him the benefit of the doubt and not having carried out an in-depth review of some items of evidence, such as the arrest warrant of 2 August 2019, it should be recalled that this evidence was indeed examined by the national authorities.

4.18 Firstly, the national authorities noted from the outset that the arrest warrant was a document for internal use by the authorities, and that the explanation as to how he obtained the original was implausible. Secondly, among other considerations, the national authorities were surprised that the Zimbabwean authorities apparently declared the complainant wanted only on 2 August 2019. Regarding the distinction between a "request for remand" and an "arrest warrant", the State party notes that the complainant, a lawyer in Zimbabwe, explicitly referred to the document in question as an arrest warrant at his hearing on 20 August 2019. The present case thus differs considerably from the judgment of the European Court of Human Rights in *M.A. v. Switzerland*, in which the national authorities had not provided reasoning for the refusal to take into consideration copies of three documents relating to a procedure (two summonses and the judgment).

4.19 The State Secretariat for Migration and the Federal Administrative Court cannot be reproached for having called into question the credibility of an internal document, the original version of which was apparently simply given by the police to the complainant's girlfriend, since the complainant was unable to provide a plausible explanation of how she obtained it. Doubt as to the credibility of the complainant's account and the aforementioned document is further increased by the fact that the complainant used falsified documents to obtain a short-stay visa (Schengen visa). Moreover, the complainant was able to leave his country of origin legally, encountering no difficulties. The explanation of the date of the arrest warrant given in the initial communication cannot therefore dispel the doubts raised about its authenticity. Notwithstanding the above, if the complainant had been subject to an arrest warrant owing to the defence cases assigned to him by his employer, he would obviously have informed his employer of his problems, which would also have been exacerbated, and he would not simply have resigned without explanation.

4.20 In addition, the letter of 9 October 2019 from his former employer does not make it possible to conclude that the complainant is at risk of persecution. Firstly, it was drafted immediately after the end of the asylum procedure in Switzerland. Secondly, it is vague and differs from the complainant's account with respect to the ill-treatment to which he was subjected. It also makes clear that the former employer was not aware either of complainant's difficulties in June 2019 or his reasons for leaving his employment. In addition, the police apparently did not contact him in connection with his former employee until 26 September 2019, although the key events date back to January 2019. The State party observes that the complainant's former employer, Mr. Dube, as a leading member of the Movement for Democratic Change and a defence lawyer for regime opponents, is at significantly greater risk of reprisals from the Zimbabwean Government than the complainant, whose only role was to assist his employer. Nonetheless, as indicated in the letter of 9 October 2019, the employer is still working as a lawyer.

4.21 In short, there is nothing specific in the case file or the communication to lend credence to the claim that the complainant would face a foreseeable, personal and real risk of being subjected to torture within the meaning of article 3 of the Convention if he were returned to Zimbabwe. The State party invites the Committee to find, in the alternative, that the return of the complainant to Zimbabwe would not constitute a violation of its obligations under articles 3 and 16 of the Convention.

Complainant's comments on the State party's observations

5.1 On 2 February 2021, the complainant submitted comments on the State party's observations, reiterating that he had exhausted domestic remedies. The State party's arguments, on the other hand, are contradicted by its own judicial authorities and are completely incompatible with the proceedings in the present case.

5.2 The domestic proceedings included a rejection by the State Secretariat for Migration of the complainant's asylum application, a direct appeal against that decision and the final decision of the Federal Administrative Court rejecting the appeal. In the Swiss legal order, asylum-related appeals decided upon by the Federal Administrative Court are not subject to further review.[28] The Court itself explicitly declared that its decision in the complainant's case was final: "Asylum-related decisions made by the State Secretariat for Migration may be challenged, with reference to article 105 [of the Asylum Act], before the Court, which then makes a final decision, unless an extradition request is made by the State from which the complainant is seeking protection (art. 83 (d) (1) [of the Federal Supreme Court Act]), an exception which does not apply in the present case."

5.3 The fact that the complainant subsequently applied to the State Secretariat for Migration for re-examination of the decision of 30 August 2019 has no bearing on the above outcome. Applications for re-examination may be submitted within 30 days of an important new fact coming to light after a final decision has already been taken. This is a discretionary remedy, and international organizations have never considered it necessary for the purpose of exhaustion. If they did, there would be great uncertainty as to what constituted a final national decision because the existence of an important new fact would almost certainly be challenged by the parties and could come to light at any time after a final decision.

5.4 Notwithstanding the above, the complainant submits that his application for re-examination also reached its logical conclusion in the form of a second (negative) decision of the Federal Administrative Court. Since both the State Secretariat for Migration and the Court rejected his second application, he has also exhausted that remedy. The claim that domestic remedies have not been exhausted cannot be sustained for that additional reason.

5.5 Of course, the State party blames the complainant for not having paid the 1,500 Swiss francs of advance fees imposed by the Federal Administrative Court, which led the Court to find his appeal inadmissible. This argument is completely unjust as the complainant is destitute and had asked the Court to waive the fees on that basis.[29] He showed that his financial situation would not allow him to bear the costs of the proceedings. Since the complainant is a failed asylum-seeker, he does not have the right to engage in gainful employment[30] and is currently entirely dependent on emergency aid; he receives a payment of 300 Swiss francs per month. His destitution is thus obvious. He also requested legal aid to hire a lawyer in view of the complexity of his case.

5.6 On 9 January 2020, after an early and summary consideration of the merits of the appeal, the Federal Administrative Court ruled that it was unfounded ("no prospects for success") and rejected the requests for a waiver of the advance payment of fees and for legal aid to hire a lawyer ("full legal aid"). The Court went so far as to indicate that no other request, including to pay the advance fees through an instalment plan or for an extension of the payment deadline, would be accepted. On 15 January 2020, the complainant asked the Court to reconsider its interim ruling of 9 January 2020, reiterating that he needed a fee waiver. On 16 January 2020, the Court rejected the application for re-examination of its interim ruling. On 31 January 2021, the Court found the complainant's appeal inadmissible on the grounds that he had not paid the advance fees. The complainant argues that, by imposing an advance payment of 1,500 Swiss francs, the Court arbitrarily denied him access to the only remedy available to him at that time and able to prevent his deportation, thus rendering it effectively unavailable.

[28] Switzerland, Federal Supreme Court Act (173.110), 17 June 2005, art. 83.

[29] Federal Administrative Court, interim ruling of 9 January 2020, paras. 2 and 3, p. 7; and Federal Administrative Court, interim ruling of 16 January 2020, para. 2, p. 4.

[30] Switzerland, Asylum Act, 142.31, 26 June 1998, art. 43.

5.7 In other cases involving similar procedural circumstances, the Committee has rejected the State party's arguments regarding the failure to exhaust domestic remedies. For example, in case *M.G. v. Switzerland*,[31] which involved an Eritrean asylum-seeker who was destitute and could not pay the advance fees of 600 Swiss francs imposed by the Federal Administrative Court in a direct appeal, the Committee held that it was unreasonable of the State party to deny the complainant the possibility of an effective review for financial reasons given that he was destitute. The Committee found that, in such circumstances, the remedy in question was not in fact available.[32] The complainant submits that it would be logical for the Committee to follow in the case at hand the same reasoning as in the case *M.G. v. Switzerland*, given the similarities between the cases.

5.8 Moreover, in the present proceedings, the Federal Administrative Court refused to grant suspensive effect to the complainant's two appeals (direct appeal and appeal for re-examination) despite the fact that he had made a prima facie case for a violation of article 3 of the Convention, providing comprehensive statements, specific documentary evidence and relevant information on the general human rights situation in Zimbabwe, particularly with respect to human rights defenders like himself, which all showed a real and personal risk.

5.9 The Federal Administrative Court's refusal to apply suspensive effect in such circumstances put the complainant at risk of a violation of his rights under article 3 of the Convention and made his appeal ineffective in terms of preventing the realization of that risk. The Committee has found the application of suspensive effect to be a necessary procedural safeguard in national deportation procedures. The Court's refusal to apply it constitutes a violation of the procedural obligations inherent in article 3 of the Convention.

5.10 On the merits, the complainant recalls the Committee's jurisprudence, according to which, when a complainant has made a prima facie case for a violation of article 3 of the Convention, the State party is required to conduct an "effective, independent and impartial" review of his or her account. During the domestic proceedings, the complainant submitted detailed statements, documentary evidence and information about the situation in Zimbabwe.

5.11 The complainant points out that he met the requirement to make a prima facie case for a violation of article 3 of the Convention in the event of deportation to the best of his abilities. The evidence he submitted related both to the general situation in Zimbabwe and to his personal situation, including the acts of harassment and physical assaults to which he was subjected and the fact that the Zimbabwean authorities were actively searching for him. Moreover, with regard to the doubt cast on the credibility of his statement and the authenticity of the documentary evidence, the complainant refers to his second appeal of 20 December 2019, in which he refuted each point raised by the Swiss authorities.

5.12 The complainant submits that the burden of proof has been transferred to the Swiss authorities, which should thoroughly review his application, a requirement they have not met. By opting for an accelerated single-judge procedure under article 111 of the Asylum Act, a provision intended to cover manifestly unfounded appeals, the Federal Administrative Court failed to conduct an "effective, independent and impartial" review. In both appeals, the Court made only an early and summary assessment to determine the probable outcome of the proceedings, a procedure specifically provided for under article 111 (2) of the Asylum Act, which stipulates that "appeal decisions in accordance with article 111 need only be summarily substantiated".

5.13 The complainant recalls that the State Secretariat for Migration rejected out of hand all the documentary evidence he submitted, including: (a) the request for remand showing that he was wanted by the Zimbabwean police because it considered that it was a document that could easily be falsified ("The authority notes firstly that since such documents are easily falsifiable, they have limited if any probative value"); (b) the medical file showing that the complainant was assaulted, as it did not, on the face of it, show that the attack had been politically motivated ("This in no way constitutes evidence of your alleged assault related to your grounds for asylum since it mentions only three days of sick leave"); and (c) the newspaper article on the assault of his former employer, Mr. Dube, at a public court hearing

[31] CAT/C/65/D/811/2017 and CAT/C/65/D/811/2017/Corr.1.

[32] Ibid., para. 6.4.

because it was not connected to his asylum application ("It mentions only an incident that does not concern you").

5.14 Later, during a re-examination, the complainant submitted new items of evidence in the form of a detailed letter from Mr. Dube, which the State Secretariat for Migration also rejected out of hand as a self-serving document ("letter of convenience") with low probative value ("The statement of the concerned party's employer ... produced in this regard has very limited probative value, and the credibility of the facts reported in it is highly doubtful"). Mr. Dube is an eminent opposition parliamentarian in Zimbabwe. He confirmed that the complainant had worked on political and sensitive cases in his law firm, which had resulted in him being directly targeted by the authorities for a physical attack. According to the Federal Administrative Court, Mr. Dube's letter shows, if anything, the opposite of what the complainant is arguing, namely that Mr. Dube, owing to his high-profile status as an opposition Member of Parliament for the Movement for Democratic Change, is at much greater risk of acts of persecution by the Zimbabwean Government than the complainant himself. The complainant submits that this argument is fundamentally wrong because it is precisely Mr. Dube's high-profile status that protects him from government reprisals. If the Court had not rejected the complainant's appeal in a summary procedure, he could have shown that many victims of abduction and torture in Zimbabwe are in fact young political activists and young professionals because as a target they are weaker and less "costly" for the regime in terms of potential political fallout.

5.15 In his application for re-examination and his subsequent appeal, the complainant specifically asked the State Secretariat for Migration and the Federal Administrative Court to take steps to ascertain whether he was known to the Zimbabwean authorities and to authenticate the request for remand. The Court took no action of this kind. In his appeal before the Court, the complainant reiterated this, citing the Court's case law in his request for an investigation by the Embassy of Switzerland in Harare to authenticate the document, a procedure which the Court has used in other cases in which the application for protection relied partly on the authenticity of certain key documents.[33] The complainant's request was again ignored.

5.16 By rejecting all the documentary evidence submitted by the complainant without taking reasonable steps to authenticate it, the State party violated the complainant's procedural rights under article 3 of the Convention. This situation is similar to that in the case *M.G. v. Switzerland*. The complainant therefore concludes that the Swiss authorities misjudged the facts, which led to a breach of the law. He submits that his deportation would violate articles 3 and 16 of the Convention.

State party's additional observations

6. On 2 August 2022, the State party indicated that it had no further observations to make.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it cannot consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of the remedies has been unreasonably prolonged, or that it is unlikely, after a fair trial, to bring effective relief to the alleged victim.[34]

[33] See Federal Administrative Court, case E-1270/20196.

[34] Committee against Torture, general comment No. 4 (2017), para. 34.

7.3 The Committee notes that, in the present case, the State party challenges the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies. The State party argues that the complainant has not shown that the appeal to the Federal Administrative Court against the decision of the State Secretariat for Migration on the application for re-examination would have been ineffective, that the advance payment of fees requested would have prevented him from exhausting the remedy or that he exercised due diligence to exhaust the available remedy. The Committee notes the complainant's argument that, after the Court's final judgment of 27 September 2019, upholding the rejection by the State Secretariat of his application for asylum in Switzerland of 30 August 2019, he filed an application for re-examination with the State Secretariat on 13 November 2019, together with an application for suspensive effect. The Committee observes that the State Secretariat rejected the complainant's application for re-examination on 20 November 2019. The complainant alleges that an appeal to the Court against the last decision of the State Secretariat would not constitute an effective remedy[35] because it does not automatically have suspensive effect, an application for re-examination is a discretionary remedy, and the assessment of his claims by the Court was summary, without a reasoned decision. Since both the State Secretariat and the Court rejected his second application, the complainant maintains that he has also exhausted that remedy. The Committee also takes note of the complainant's argument that he would have risked deportation to Zimbabwe during the extraordinary re-examination or review procedure[36] given that, in its interim ruling of 9 January 2020, the Court had denied him authorization to remain in Switzerland until the completion of the procedure and that his request for free legal aid was rejected.[37] The Committee also notes that the complainant considers: (a) that he is destitute, since he is not permitted to work; (b) that this situation prevented him from covering the procedural costs; (c) that he asked the Court to waive the fees on this basis; and (d) that the requirement for an advance payment of 1,500 francs has denied him access to a thorough and diligent examination of his case by the Court in an appeal against the decision of the State Secretariat rejecting his application for re-examination.[38]

7.4 The Committee considers that, in the complainant's personal circumstances, all his arguments and evidence against the decision of the State Secretariat for Migration were subject only to an early and summary assessment by the Federal Administrative Court to determine the likely outcome of the proceedings, without an effective examination of his appeal having been carried out. Moreover, the Committee observes that the requirement placed on the complainant to pay 1,500 Swiss francs in order for his appeal to the Court to be admissible was unjust.[39] This view is based on the fact that the complainant is destitute, that he is not permitted to work in the State party's territory and that the assistance he receives amounts to only 300 Swiss francs per month. It therefore seems unreasonable to deny the complainant the possibility of access to the justice system on financial grounds considering his difficult financial circumstances.[40] This remedy was thus not available to the complainant.

7.5 In these circumstances, the Committee concludes that the objection of inadmissibility on grounds of non-exhaustion of domestic remedies cannot be upheld in the present case. In the absence of any other question as to the admissibility of the complaint, the Committee declares it admissible given that it raises questions under articles 3 and 16 of the Convention and that the facts and basis of the complainant's claims have been duly substantiated[41] and proceeds with the consideration on the merits.

[35] *D.C. v. Switzerland* (CAT/C/73/D/889/2018), para. 9.4.
[36] *X. v. Switzerland*, para. 8.3.
[37] Interim ruling of the Court of 9 January 2020, para. 2, p. 7.
[38] See paragraphs 5.5 and 5.6 above.
[39] *M.G. v. Switzerland*, para. 6.4.
[40] *C. M. v. Switzerland* (CAT/C/44/D/355/2008), para. 9.2; and *Abdulkarim v. Switzerland* (CAT/C/62/D/710/2015), para. 6.2.
[41] *K.A. et al. v. Sweden* (CAT/C/39/D/308/2006), para. 7.2.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

8.2 In the present case, the issue before the Committee is whether the return of the complainant to Zimbabwe would constitute a violation of the State party's obligation under articles 3 and 16 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

8.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Zimbabwe. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.[42] However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

8.4 The Committee recalls its general comment No. 4 (2017), which states, first, that the non-refoulement obligation exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, either as an individual or as a member of a group which may be at risk of being tortured in the State of destination and, second, that the Committee's practice has been to determine that "substantial grounds" exist whenever the risk is "foreseeable, personal, present and real".[43] The Committee further recalls that the burden of proof is on the complainant, who must present an arguable case, that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, personal, present and real. However, when the complainant is in a situation where he or she cannot elaborate on his or her case, the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based.[44] The Committee gives considerable weight to findings of fact made by organs of the State party concerned; however, it is not bound by such findings, as it can make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.[45]

8.5 In the present case, the Committee takes note of the complainant's argument that, if returned to Zimbabwe, he would be considered an opponent for having represented, as a lawyer, victims of State violence and members of the Movement for Democratic Change, which increases the risk as he was physically assaulted and has been wanted by the authorities since 2 August 2019.

8.6 The Committee notes the State party's conclusion that there is no indication that there are substantial grounds for fearing that the complainant would face a specific and personal risk of being subjected to torture upon his return to Zimbabwe and that his allegations and evidence were considered implausible and not credible. However, the Committee notes that the State party admits, for example, that there is a limited risk for human rights defenders; and that detainees are vulnerable to human rights violations, including torture, as legal procedures and safeguards, such as access to family members, lawyers and doctors, are

[42] Committee against Torture, general comment No. 4 (2017), para. 43.
[43] Ibid., para. 11.
[44] Ibid., para. 38.
[45] Ibid., para. 50.

denied. Nonetheless, according to the State party, there is no consistent pattern of gross, flagrant or mass violations of human rights in Zimbabwe.

8.7 In this context, the Committee takes note of the course of the complainant's asylum application procedure before the Swiss authorities. It notes the alleged inconsistencies and contradictions in the complainant's statements and submissions, to which the State party has drawn attention. However, the Committee observes that the complainant argues that there were procedural defects, since: (a) neither the State Secretariat for Migration nor the Federal Administrative Court took action in response to his request to verify the authenticity of the arrest warrant of 2 August 2019; (b) the Swiss authorities based their reasoning on challenging the authenticity of the documents submitted by the complainant without any measures being taken to verify their authenticity; (c) the Court refused to grant suspensive effect to the complainant's two appeals (direct appeal and appeal for re-examination); and (d) on 9 January 2020, after an early and summary assessment of the merits of the appeal, the Court rejected the request for a waiver of the advance payment of fees and the request for legal aid to hire a lawyer, without taking into account new evidence. In this regard, the Committee recalls that the right to an effective remedy contained in article 3 of the Convention requires, in this context, an opportunity for an effective, independent and impartial review of the decision to expel or return someone, once that decision has been made, when there is a plausible allegation that article 3 issues have arisen.[46] In the present case, the State party did not give the complainant the opportunity to demonstrate the risks he would face in the event of forced return to Zimbabwe. In the second appeal, the Court carried out only an early and summary assessment of the complainant's arguments; it questioned the authenticity of the documents provided but did not take any measures to verify it. Furthermore, the requirement to pay procedural costs when the complainant was facing financial hardship denied him the opportunity to apply to have his appeal examined by the judges of the Court. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of an effective, independent and impartial review of the decision of the State Secretariat to expel the complainant constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.[47]

9. In the light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the return of the complainant to Zimbabwe would constitute a violation of article 3 of the Convention. Having reached that conclusion, the Committee does not consider it necessary to examine the claim made under article 16 of the Convention.

10. The Committee considers that the State party is required by article 3 of the Convention to consider the complainant's appeal in the light of its obligations under the Convention and the present observations. The State party is also requested to refrain from deporting the complainant while his application for asylum is being considered.

11. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days of the date of transmittal of the present decision, of the steps it has taken to respond to the above observations.

[46] *Agiza v. Sweden*, para. 13.7.

[47] Committee against Torture, general comment No. 4 (2017), para. 13.