United Nations CAT/C/71/D/900/2018

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

Distr.: General
29 September 2021
English
Original: French

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 900/2018*, **

Communication submitted by:	X (represented by counsel, Gian Luigi Berardi)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	4 December 2018 (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 11 December 2018 (not issued in document form)
Date of adoption of decision:	22 July 2021
Subject matter:	Expulsion to Eritrea
Procedural issues:	None
Substantive issues:	Risk to life and risk of torture or ill-treatment in the event of expulsion to country of origin
Articles of the Convention:	1, 3 and 16

1.1 The complainant is X, a national of Eritrea who was born on 1 August 1998. His application for asylum in Switzerland was rejected and he is now facing expulsion to Eritrea. He considers that his expulsion would constitute a violation by the State party of articles 1, 3 and 16 of the Convention. The State party has made the declaration under article 22 (1) of the Convention, effective 2 December 1986. The complainant is represented by counsel.

1.2 On 11 December 2018, 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 Eritrea while his complaint was being considered. On 20 December 2018, the State party informed the Committee that it had suspended the complainant's expulsion to Eritrea.

The facts as submitted by the complainant

2.1 The complainant, who belongs to the Saho ethnic group, was born in Wilisho, Eritrea, near the Ethiopian border. He dropped out of school in 2015, when he was 16 and a half years old, because the quality of the teaching was poor, and he then worked for two months as a shepherd. During this period, soldiers stationed near his village came to his home twice in

* Adopted by the Committee at its seventy-first session (12–30 July 2021).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Claude Heller, Erdoğan İşcan, Liu Huawen, Ilvija Pūce, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.

order to conscript him into the Eritrean army; they had found his name on a list of school dropouts that had been provided to the army by the school. The first time they came, the complainant was not at home; the second time, he managed to hide from them outside the house. The soldiers then issued a summons ordering him to go to the school, accompanied by his parents. According to the complainant, the soldiers intended to round up a group of young people in order to send them to the military camp in Sawa. Fearing that he would be conscripted into the army, the complainant decided to leave the country. He travelled illegally to Libya, via Ethiopia and the Sudan. He then boarded a boat for Italy.

2.2 On 9 September 2015, the complainant arrived in Switzerland and filed an asylum application. Because he had left Eritrea illegally, his mother had had to pay a fine to the authorities in order to avoid being sent to prison in his place.[1] The complainant was given two hearings by the Swiss authorities, on 8 October 2015 and 20 April 2017, during which he stated that he had been born in Wilisho, he belonged to the Saho ethnic group, he was a Muslim and he had left school at the age of 16 and a half years.

2.3 On 8 October 2015, the State Secretariat for Migration informed the migration authority of the Canton of Geneva of the arrival of a minor asylum seeker who was unaccompanied (that is, not assisted by a parent or guardian) and invited the authority to take the appropriate measures. By an ordinance of 28 October 2015, the Court for Adult and Child Protection of the Canton of Geneva appointed a guardian (legal representative) to represent and assist the complainant until he reached the age of majority on 1 August 2016.

2.4 On 20 April 2017, more than 18 months after his initial hearing on 8 October 2015, the complainant was given a full hearing regarding his grounds for seeking asylum. Since he had already reached the age of majority, he could no longer be assisted by his guardian and was therefore unable to prepare properly for the hearing. Furthermore, during both hearings, the interpreter spoke in Tigrinya, a language that the complainant had learned only at school, whereas his mother tongue is Saho. The complainant was not able to raise this problem at the time, since he lacked the assistance of a legal representative.

2.5 On 16 January 2018, the State Secretariat for Migration rejected the complainant's application for asylum, mainly because it considered that his fear of being enlisted in the army was not based on anything concrete. In particular, the fact that he learned from his mother – that is, from a third party – that soldiers were looking for him was, according to the relevant case law, "insufficient" evidence of a well-founded fear of persecution. Moreover, his account contained chronological discrepancies between the date on which he dropped out of school and the date of the alleged round-ups; the complainant had never had direct contact with the military authorities of his country, and a merely theoretical fear of having to perform military service was not intense enough to constitute a well-founded fear of persecution. His description of being summoned by the military authorities was not plausible. Taken by itself, the fact that he left the country illegally as a minor could not (or no longer) be considered to justify a fear of serious harm, since there was no reason to believe that he might be considered a draft evader by the Eritrean authorities. The complainant had therefore failed to demonstrate that he faced a real and specific risk of being subjected to treatment that is prohibited by article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

2.6 On 14 February 2018, the complainant lodged an appeal with the Federal Administrative Court against the decision of the State Secretariat for Migration. Essentially, he argued that the State Secretariat had not given him the opportunity to explain the inconsistencies in his account. These had arisen because he had forgotten certain details in the time that had elapsed between the events and his hearings, the first of which had, moreover, taken place when he was still a minor. He also argued that the State Secretariat should have examined further the fact that soldiers had come looking for him at his home.

2.7 On 21 February 2018, the Federal Administrative Court granted his application for legal assistance and appointed the complainant's chosen lawyer as his legal representative. In a decision of 12 October 2018, the Court confirmed the decision of 16 January 2018 of the

[1] European Asylum Support Office, *Country of Origin Information Report: Eritrea – National Service and Illegal Exit* (November 2016), p. 19.

State Secretariat for Migration. It noted that "refusal to serve and desertion are indeed severely punished in Eritrea. The penalty that is imposed is generally accompanied by imprisonment in inhuman conditions, and often by torture, since desertion and refusal to serve are considered acts of protest against the regime; as such, this penalty constitutes a form of persecution, and a well-founded fear of being exposed to it leads to recognition as a refugee." However, the Court concluded that in this case, "there was no evidence that the person concerned was actually at risk of being enlisted".

2.8 The Federal Administrative Court mistakenly noted that the complainant belonged to the Tigrinya ethnic group and that he had left school at the age of 15 years. These details are not without importance, as the first would explain any misunderstandings that might have arisen with the Tigrinya interpreter, and the second would make it all the more plausible that the complainant was at risk of being conscripted into the military when he was still a minor.

2.9 The complainant declares that he has exhausted all available domestic remedies and that he has never submitted his complaint for examination under another procedure of international investigation or settlement.

The complaint

3.1 The complainant argues that the State party would be in breach of its obligations under articles 1 and 3 of the Convention if it returned him to Eritrea, where he would be subjected to acts of torture by the authorities. The Federal Administrative Court did not take into account that ill-treatment and abuse are so widespread within both the military and civilian sectors of the national service that all members of the service face a real and serious risk of being subjected to such abuse. The Court's argument – that is, that the complainant's personal circumstances did not place him at real risk of being subjected to treatment that is prohibited by international law – is not convincing. For example, according to the Court, it was not plausible that soldiers seeking to recruit young people would ask them to present themselves with their parents. Yet it is not hard to imagine the military authorities requesting that the complainant be accompanied by his parents on the grounds that he was still a minor. The Court did not confirm that the complainant's account was implausible and inconsistent, as argued by the State Secretariat for Migration in its decision of 16 January 2018. It would appear, therefore, that the Court did not find this argument convincing. Furthermore, the complainant's statements are actually consistent with the practice of the Eritrean authorities in this regard. Although most recruits are at least 18 years old, there are also some 16-year-olds stationed in Sawa, many of whom are young Eritreans who have dropped out of school, like the complainant.[2] According to the International Labour Organization, it has been confirmed in various reports by non-governmental organizations that almost one third of new conscripts in military training centres are under 18 years old.[3]

3.2 By deciding on the complainant's asylum application after he had reached the age of majority, the State Secretariat for Migration circumvented the principles that apply to the assessment of evidence in connection with asylum applications submitted by minors. If it had dealt with his case as promptly as required by the principle of the best interests of the child, it would have (and easily could have) reached a decision before he became an adult, given that he submitted the application at the age of 17 years and 1 month. In those circumstances, it would have been more likely to give him the benefit of the doubt, in view of the fact that he was not only a minor but also unaccompanied.

3.3 This point is all the more important as the complainant's two hearings were conducted not in Saho, his mother tongue, but in Tigrinya, a language that he had learned only at school, and the hearings took place more than 18 months apart. This could explain any omissions and inconsistencies or contradictions of which he has been accused. In any case, the alleged

[2] Swiss Refugee Council, "Érythrée: recrutement de mineurs" (Eritrea: recruitment of minors) (21 January 2015), p. 3.

[3] International Labour Organization, Individual Case (CAS) – Discussion: 2015, Publication: 104th ILC session (2015), available at http://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3241910.

contradictions relating to the attempts to find him in Eritrea before his departure are not decisive in this case and should be considered to be of secondary importance.

3.4 The complainant's illegal departure from Eritrea constitutes an aggravating factor that the Federal Administrative Court failed to take into account, in violation of article 3 of the European Convention on Human Rights.[4] According to the findings of the commission of inquiry on human rights in Eritrea published in 2016, the use of torture by Eritrean officials is widespread and systematic in civilian and military detention centres.[5] If the complainant is returned to Eritrea, he does not intend to comply with the Eritrean authorities' requirement that he sign the "regret form", in which he would have to acknowledge that he "regrets having committed an offence by failing to complete his national service" and that he "is prepared to accept any appropriate penalty when the time comes", or to pay the corresponding tax in order to regularize his military situation.[6] Moreover, he cannot be forced to do so without there being a violation of his freedom of opinion or even his dignity.

3.5 The position taken by the Federal Administrative Court did not make sense. On the one hand, the Court recognized that refusal to serve and desertion were severely punished in Eritrea and that the penalty imposed, which was completely arbitrary or disproportionate, was generally accompanied by imprisonment in inhuman conditions for an indefinite period of time, and often by torture that was likely to cause serious physical or psychological harm. According to the Court, refusal to serve and desertion, as well as the illegal departure that usually followed, were considered acts of protest against the regime. The penalty in such cases therefore constituted a form of persecution, and a well-founded fear of being exposed to it led to recognition as a refugee. On the other hand, strangely, the Court seemed to consider (based on the assumption that he had fled his country without having had any prior contact with the military authorities) that he, as a draft evader, would no longer be exposed to such persecution at the hands of the military authorities if he were to return to Eritrea once he had turned 18 years old, that is, the official minimum age for enlistment in the army. Yet, in both these scenarios, what matters is that the complainant is "actually at risk of being enlisted".

3.6 The Federal Administrative Court completely overlooked the complainant's specific status as someone who fled his country in order to avoid conscription. The complainant has now reached the official age for compulsory military service, he is not eligible for exemption therefrom[7] and he would almost certainly be identified and arrested as soon as he arrived in Eritrea. The Court was wrong to conclude that, in the context of compulsory military service, a young draft evader would not be at risk of torture or slavery upon return to Eritrea. There is no evidence that Eritreans who return to their country are no longer at risk of being put in danger or punished, and if there is any doubt, protection should be the priority.[8]

3.7 In a judgment on another case, the Federal Administrative Court itself admitted that it did not have access to reliable sources of information on the human rights situation in Eritrea, for several reasons, including the lack of quality sources (due to methodological problems, bias and insufficiency), the fact that Eritrea was a single-party State, the lack of government transparency, the restrictions on the freedom of expression and movement of those who worked for foreign missions in Eritrea and the fact that representatives of international human rights organizations were unable to gain access to the country.[9] Furthermore, in another judgment, the Court declared that forced removals to Eritrea were, as a general rule, not feasible, and that it had left undecided the question of whether they

[4] See, inter alia, European Court of Human Rights, *M.O. v. Switzerland* (application No. 41282/16), judgment of 20 June 2017, para. 79.

[5] A/HRC/32/47, para. 39.

[6] See, inter alia, A/HRC/RES/38/15, para. 6 (j).

[7] European Asylum Support Office, *Country of Origin Information Report: Eritrea – National Service and Illegal Exit* (November 2016), p. 42.

[8] Here the complainant is quoting remarks made by the former Special Rapporteur on the human rights of migrants; see Radio Télévision Suisse, "La gestion des réfugiés érythréens par la Suisse critiquée par l'ONU" (Switzerland criticized by the United Nations for its management of Eritrean refugees), 17 February 2017.

[9] Switzerland, Federal Administrative Court, Reference Judgment D-2311/2016, 17 August 2017.

were lawful.[10] Given that the Court expressly refrained from deciding on the lawfulness of forced removals, it is hard to understand how the Court subsequently reached the conclusion that returning the complainant, who was a draft evader and therefore likely to be subject to forced removal, would not be against international law.

3.8 The complainant also argues that returning him to Eritrea, where he would be exposed to cruel, inhuman or degrading treatment, would constitute a violation of article 16 of the Convention. According to several reliable reports, military service in Eritrea amounts to slavery and forced labour.[11] The Federal Administrative Court did not properly explain why it had diverged from this position. To date, the situation in Eritrea has not improved.[12]

State party's observations on the merits

4.1 In its observations of 7 June 2019, the State party provides detailed information on asylum procedures in Switzerland and asserts that the complaint ought to be rejected on the merits. The State party recalls the considerations that must be taken into account in assessing whether the complainant runs a foreseeable, present, personal and real risk of being subjected to torture upon return to his country of origin: evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the country of origin; any claims of torture or ill-treatment in the recent past and independent evidence to support those claims; the political activity of the complainant within or outside the country of origin; and any evidence as to the credibility of the complainant and the general veracity of his claims, despite some inconsistencies in his presentation of the facts or some lapses of memory.

4.2 The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not, in itself, constitute sufficient grounds for determining that a particular person would be subjected to torture upon return to that country. The Committee must establish whether the complainant is "personally" at risk of being subjected to torture in the country to which he would be returned. Additional grounds must be adduced in order for the risk of torture to qualify as "foreseeable, real and personal". The risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

4.3 The State party then describes the Swiss authorities' practice when it comes to processing asylum applications from Eritrean nationals. The State Secretariat for Migration constantly evaluates reports on Eritrea and exchanges information with experts and partner authorities. On that basis, it gives an updated appraisal of the situation, which serves as a basis for Swiss asylum practice. In May 2015, the State Secretariat prepared a report entitled *Érythrée – Étude de pays* (Eritrea – Country Focus), which brings together all this information. This report was approved by four partner authorities, a scientific expert and the European Asylum Support Office. In February and March 2016, members of the State Secretariat undertook a mission to Eritrea in order to review, develop and supplement this information, in the light of other sources that had become available in the meantime. The Secretariat published an update, based on all the information gathered, on 10 August 2016.[13] In reports published between December 2015 and August 2016, several national authorities – such as those of Sweden and Norway, and the Home Office of the United Kingdom of Great Britain and Northern Ireland – reached similar conclusions.

4.4 Since January 2017, the Federal Administrative Court has handed down three reference judgments concerning Eritrea,[14] in which it discusses specific limitations relating to the availability of information on the situation in Eritrea. In its judgment of 10 July 2018, the Court also devoted two and a half pages to discussing the shortcomings of some important categories of sources regarding Eritrea and stated that it had some methodological reservations about all the available sources. In that judgment, the Court took into account the

[10] Switzerland, Federal Administrative Court, Reference Judgment E-5022/2017, 10 July 2018.

[11] A/HRC/32/47, paras. 65–68.

[12] Amnesty International, *Amnesty International Report 2017/18: The State of the World's Human Rights*, pp. 188–190; and A/HRC/38/50, para. 100.

[13] State Secretariat for Migration, "Focus Eritrea: Update Nationaldienst und illegale Ausreise" (Focus on Eritrea: Update on National Service and Illegal Exit), 10 August 2016.

[14] Judgments D-7898/2015 of 30 January 2017, D-2311/2016 of 17 August 2017 and E-5022/2017 of 10 July 2018.

available information on Eritrea, in accordance with the quality standards and scientific methods approved by the European Union authorities and member State authorities that are responsible for issues relating to migration, especially asylum and removal. Keeping in mind the challenges faced by those seeking information on Eritrea, the Court took into consideration not only the facts reported, quite a while ago in some cases, by international human rights organizations, but also the facts reported more recently by foreign journalists and specialists from European authorities in the context of information-gathering missions to the country. The Court therefore examined the situation in Eritrea in great detail, over tens of pages, drawing on a large number of sources. It evaluated the information, reports and arguments contained in those sources very carefully. In its judgments on recent cases concerning Eritrea, including Judgment E-1218/2019 of 16 April 2019, the Court confirmed its earlier findings. That is why the State party considers those judgments to be relevant to the present case.

4.5 According to the Swiss migration authorities, refusal to perform military service and desertion are not, in themselves, enough to justify recognition as a refugee. However, asylum seekers must be recognized as refugees in cases where refusal to serve or desertion entails persecution. If the examination of an individual case reveals that the person concerned would be not only punished in order to ensure his or her compliance with military obligations but also considered a political opponent and subjected to disproportionate punishment and inhuman treatment, the person is considered to be at risk of persecution under refugee law.

4.6 The Federal Administrative Court has noted that refusal to serve and desertion are severely punished in Eritrea. The penalty that is imposed is generally accompanied by imprisonment in inhuman conditions, and often by torture, since desertion and refusal to serve are considered acts of protest against the regime. As such, this penalty constitutes a form of persecution, and a well-founded fear of being exposed to it leads to recognition as a refugee. However, a fear of this kind is only well founded if the person concerned has already actually been in contact with the military authority or another authority, provided this contact implied that the person would soon be recruited (for example, the receipt of a summons from the army). It is not enough for there to be merely a possibility that the person may receive a summons at some point in the future. Moreover, the fact that the person may have to do military service is not, in itself, decisive. The question of whether the potential enlistment of the person concerned in the national service upon his or her return to Eritrea would constitute treatment that is prohibited by international law therefore relates to the question of whether removal is lawful and enforceable. The execution of a removal order is unlawful in cases where Switzerland, under public international law, cannot force a foreign national to travel to a given country and where no other State has declared that it is willing to receive the person, in accordance with the principle of non-refoulement. Under domestic law, a removal order is unenforceable if the removal or expulsion of the foreign national to his or her country of origin would actually put him or her in danger, for example if there is a war, a civil war or widespread violence or if the person needs medical treatment.

4.7 Since June 2016, the State Secretariat for Migration has taken the position that the mere fact that a person left Eritrea illegally does not expose that person to certain persecution upon return to the country. Consequently, Eritrean nationals who have not yet been summoned for national military service, who are exempt from service or who have been released from service are no longer recognized as refugees on that basis alone. Nevertheless, the State Secretariat still examines every asylum application carefully. The Federal Administrative Court confirmed and explained this practice in the reference judgments mentioned above.

4.8 In Reference Judgment D-7898/2015 of 30 January 2017, the Federal Administrative Court discussed the likelihood of Eritreans who had left their country illegally being persecuted on those grounds if they returned to the country. The Court summarized its findings recently in Judgment E-1218/2019 of 16 April 2019. After a thorough analysis of the available information, it reached the conclusion that the practice of granting refugee status solely on the grounds of illegal departure from Eritrea could no longer be followed. This assessment is based primarily on the observation that members of the Eritrean diaspora, some of whom left the country illegally, are able to return to Eritrea for short stays without coming to any harm. Consequently, individuals who left Eritrea without authorization can no longer

be considered, as a general rule, to be at risk of severe punishment and thus eligible for asylum.

4.9 In this case, the expulsion of the complainant would not be unenforceable. Eritrea is not in a situation of war, civil war or widespread violence that would lead automatically – and regardless of the circumstances of the case – to the assumption that anyone from that country faced real danger. Moreover, the living conditions there have improved, despite ongoing economic problems; the situation has stabilized as regards the state of medical resources, access to water and food, and training conditions. In addition, a large proportion of the population receives substantial remittances from the diaspora. The peace agreement that was signed with Ethiopia on 9 July 2018 put an end to the conflict between the two countries. In this context, removal orders are enforceable unless, owing to specific personal circumstances, the person's life would be in danger if he or she were to be returned; the execution of such orders no longer requires the existence of particularly favourable individual circumstances, as stipulated in earlier case law. The risk of being enlisted in the national service can no longer be considered, in itself, an obstacle to the execution of a removal order.

4.10 Furthermore, the expulsion of the complainant would not be unlawful. For the reasons given by the Federal Administrative Court in Reference Judgment E-5022/2017 of 10 July 2018, all persons who state that they left their country for fear of being summoned for national service must also demonstrate that it is highly likely that they would be subjected personally – and not simply by an unfortunate coincidence – to measures that are incompatible with the relevant provisions of international law. In the present case, according to the complainant, the Court based its decision solely on information from the Eritrean authorities and did not examine the situation of persons who are returned to Eritrea in sufficient depth. Yet it is clear from the judgment in question, and from the other judgments mentioned above, that the relevant case law is based on a wide range of sources, including reports drawn up by international organizations, other case law and press articles.

4.11 The case of *M.O. v. Switzerland*, which is cited by the complainant, is not relevant. In its judgment on that case, the European Court of Human Rights held that the general human rights situation in Eritrea did not prevent the applicant's removal per se. The Court did not accept that illegal departure from Eritrea was enough to justify granting refugee status to an Eritrean asylum seeker.

4.12 The complainant is also critical of the fact that according to the case law of the Federal Administrative Court, national service in Eritrea should be considered forced labour rather than slavery. However, it should be recalled that this classification is based on Judgment E-5022/2017 of 10 July 2018, in which the Court analysed this terminology issue in the light of the Slavery Convention of 25 September 1926 and the relevant case law of other national courts and the European Court of Human Rights. The Federal Administrative Court concluded that the exercise of the powers attaching to the right of ownership is the essential defining feature of slavery, under article 1 of the Slavery Convention, and that Eritrean national service cannot be said to have this feature. As regards servitude, the Court held that servitude was a permanent state and that it could not assume that the same was true of national service. This approach is in line with that of the Human Rights Council: in its resolution 38/15 of 6 July 2018, the Council did not mention slavery when referring to the report of the Special Rapporteur on the situation of human rights in Eritrea.[15]

4.13 In addition, the complainant has not provided any new information that relates to him specifically and that suggests he would be at risk of prohibited treatment if he were to perform military service. In reality, he is trying to have the situation in Eritrea reassessed to his advantage, without presenting conclusive arguments linked to his personal situation. Lastly, as mentioned above, the complainant cannot be considered a draft evader.

4.14 According to the conclusions reached by the Federal Administrative Court after a detailed analysis of the Eritrean national service, ill-treatment and abuse are not so widespread within the service that all members face a real and serious risk of being subjected to such abuse. It therefore cannot be said that the complainant would be at serious risk of being exposed to a violation of the prohibition on forced or compulsory labour if he were to

[15] See A/HRC/RES/38/15.

perform national service. The possibility that the complainant might be required to do national military service upon his return to Eritrea contravenes neither article 3 nor article 16 of the Convention.

4.15 The complainant does not claim to have been tortured or ill-treated in his country of origin. There is also nothing in his case file to suggest that members of his family have been exposed to such treatment, for example as a result of his departure. He does not claim to have engaged in political activity within or outside his country of origin. As regards his personal situation, the complainant argues that he would be at risk of being subjected to treatment that is prohibited by article 3 of the Convention because he has reached the age of majority. However, as is clear from the case law of the Federal Administrative Court, the mere fact that a person left Eritrea illegally no longer justifies recognition as a refugee, and there is only a risk of penalties upon return in cases where additional negative factors are involved. According to this case law, only if such factors were involved would the complainant be considered an undesirable person by the Eritrean authorities. Despite the fears expressed by the complainant, there are no such factors involved in this case. There is no evidence in the case file that the complainant avoided military service. The complainant has not, at any stage of the proceedings, provided credible evidence that he was officially targeted for recruitment or that he refused to comply with a military summons. He is therefore wrong to call himself a "young draft evader". The sole fact that he left his country illegally and then reached the age for enlistment does not mean that he can be classed as someone who avoided military service.

4.16 The complainant criticizes the national authorities for considering that his account lacked credibility. Contrary to his claims, this lack of credibility was noted by both the State Secretariat for Migration and the Federal Administrative Court. The Court noted, in particular, that his claims lacked substance and that his statements about soldiers visiting his home were mere conjectures that he failed to substantiate. According to the Court, his claim that the request that he present himself at school with his parents should be understood as a military summons was clearly illogical, for it was hard to imagine, given the situation in the country, that soldiers trying to recruit young people would ask them to come with their parents. In his communication, the complainant does not provide any information that would be conducive to a different interpretation of the situation. In particular, the argument that 16-year-olds are also in danger of being enlisted is not relevant by itself, since it does not relate to the complainant's individual situation, bearing in mind that he has not shown that he was, at any point in his life, in contact with the military authorities or targeted by them.

4.17 In fact, at his first hearing, the complainant simply stated that he had left his country because there had been round-ups in his region. There is no reason to presume that he was likely to be affected by those round-ups, and he cannot be considered a potential recruit solely on the grounds that he dropped out of school. In addition to this, when he was asked at his second hearing about his reasons for seeking asylum, the complainant initially admitted that he had left Eritrea because the living conditions were difficult and because he wanted a better future; it was only later that he mentioned the round-ups. In his communication, the complainant does not present any new arguments relating to the credibility of his reasons for seeking asylum; he simply contests the national authorities' assessment of the facts.

4.18 The complainant then makes several references to procedural errors. To begin with, he claims that the State Secretariat for Migration waited, unfairly, for him to reach the age of majority before holding the second hearing; in doing so, it prevented him from being assisted by a guardian and thus from being able to present his reasons for seeking asylum in a clear and concise manner. However, this accusation is not based on anything concrete. The second hearing was indeed held 18 months after the first one, but there is no evidence to suggest that this was a premeditated attempt to deprive him of procedural safeguards. The complainant was able to freely express his reasons for seeking asylum at that hearing, in which a representative of a charitable organization also participated, with his consent. The representative raised no concerns about the record of the proceedings or the hearing itself. Ultimately, if the complainant and his guardians felt that the proceedings before the State Secretariat were taking too long, they could and should have raised the issue with the Secretariat in a timely manner; they did not do this at any point in the proceedings. It should

also be noted that this allegation of wrongdoing was examined by the Federal Administrative Court after an appeal was lodged through counsel.

4.19 The complainant also claims that he was questioned in Tigrinya but that his mother tongue is Saho. Yet he stated at the first hearing and recorded on his personal data sheet that his mother tongue was Tigrinya.[16] He said that he could understand the interpreter, he did not report any problems of communication with his interviewers and he requested only one correction to the record of the second hearing, after reading it in Tigrinya. Lastly, he confirmed that his statements had been accurately reflected in the records of the proceedings. The representative of a charitable organization, meanwhile, made no complaints about the hearing. There is nothing to suggest that the complainant encountered any problems of a linguistic nature.

4.20 In sum, there is no reason to diverge from the finding that the complainant's claims lack credibility, especially as the proceedings before the relevant national bodies were properly conducted. Therefore, the complainant has not thoroughly demonstrated that he runs a personal, foreseeable, real and present risk of being subjected to torture or ill-treatment if he is returned to Eritrea.

Complainant's comments on the State party's observations

5.1 In his comments of 13 August 2019, the complainant refers to the Common European Union Guidelines for Processing Country of Origin Information, which are cited by the State party. According to these guidelines, if it is generally the case that there is little information available on the country or the subject concerned, that should be taken into account. Since there is little verifiable information on the situation in Eritrea, the State party's argument that the Federal Administrative Court has examined the situation in detail, drawing on a large number of sources, is not very convincing. Indeed, the Court itself acknowledged, in a two-and-a-half-page discussion, that it had some methodological reservations about all the available sources. The lack of information on the situation in Eritrea is confirmed by the very sources that are mentioned by the State party.[17] The State party does not mention any sources to support its claim that an asylum seeker who left Eritrea illegally as a minor in order to avoid his current or future military obligations, who reached the age of majority in the host country and who was forced to return to Eritrea, would not be at risk of being subjected to torture or ill-treatment in Eritrea. The State party does not mention any sources to support the finding of the Court, in Reference Judgment D-7898/2015 of 30 January 2017, that Eritrean nationals had supposedly returned to the country from abroad without coming to any harm. This finding is therefore groundless. Given that the Court did not have enough comprehensive and reliable information to be able to assess the situation of young Eritrean returnees, the State party cannot legitimately claim, except tautologically, that the Court carried out a thorough analysis of the available information in this case.

5.2 As a draft evader and a young man of recruitable age, the complainant belongs ipso facto to a vulnerable group, and therefore to a group that is at risk of being exposed to treatment that violates international law. The fact that a person belongs to such a group is a deciding factor in the assessment of whether he or she would be at risk in the event of expulsion. The European Court of Human Rights has established that desertion constitutes a risk factor in cases of expulsion to Eritrea.[18] The complainant also refers to the case of *X v. Denmark*,[19] in which the Human Rights Committee found that the expulsion of the author to

[16] The State party provides a copy of this bilingual data sheet, which is written in Tigrinya and German. According to the sheet, the complainant was born on 1 January 1998, his mother tongue is Tigrinya and he is a Christian. The sheet is dated 9 September 2015 but is not signed.

[17] European Asylum Support Office, *Country of Origin Information Report: Eritrea – National Service and Illegal Exit* (November 2016), p. 15.

[18] European Court of Human Rights, *Said v. Netherlands* (application No. 2345/02), judgment of 5 July 2005, paras. 54–55.

[19] CCPR/C/110/D/2007/2010.

Eritrea would constitute a violation of article 7 of the International Covenant on Civil and Political Rights.[20]

5.3 The complainant rejects the State party's argument that the sole fact that he left his country illegally and then reached the age for enlistment does not mean that he can be classed as someone who avoided military service. According to the complainant, for the purposes of asylum, all that matters is whether the persecutor wishes to gain access to the person in question for one of the reasons listed in the relevant law. Before he left Eritrea, the complainant had dropped out of school and was therefore being looked for by the military authorities. Although the official age for conscription is the age of majority, that is, 18 years, the Government of Eritrea organizes round-ups in villages on a regular basis in order to forcibly recruit young persons from the age of 15 or 16 years, especially those who are not enrolled in school.[21]

5.4 The complainant also rejects the Federal Administrative Court's argument that the concepts of slavery and servitude are not applicable to the national regime in Eritrea.[22] In the case *M.G. v. Switzerland*, the Committee explicitly agreed with the commission of inquiry on human rights in Eritrea that, given the indefinite duration of military service, there were reasonable grounds to believe that it constituted no less than the enslavement of a whole population and therefore a crime against humanity.[23]

5.5 To date, the Swiss authorities have not assessed the situation faced by young persons who are forced to return to Eritrea after they have reached the age for recruitment into the national service. Simply by leaving Eritrea illegally when they were coming up to the age for military recruitment, they had shown from the outset that they were unwilling to perform military service.

5.6 As regards the length of the proceedings before the State Secretariat for Migration, the fact that the complainant's guardians did not raise the issue cannot, by any means, be held against him. Moreover, when he was a minor, the complainant unfortunately did not receive any legal assistance that would have enabled him to prepare for the hearing on his reasons for seeking asylum.

5.7 The complainant maintains that his mother tongue is Saho and that his hearings should therefore have been conducted in this language. At the hearing concerning his reasons for seeking asylum, he was told that there were no Saho interpreters available in Switzerland and that one would have to be called in from Germany (if he is not mistaken), which would delay the proceedings. That was why he agreed to have a Tigrinya interpreter. The fact that he said he could understand the interpreter when he was asked just once, at the very beginning of the hearing, whether he could, does not prove that he was actually able to understand the questions that were translated by the interpreter and to make himself understood by the interpreter. The personal data sheet, which states that his mother tongue is Tigrinya, was clearly filled in without his knowledge, since it was not signed by him. The sheet also misstates his religion and date of birth.

5.8 In his additional comments of 6 December 2019, the complainant cites a report written by the State Secretariat for Migration and published by the European Asylum Support Office in September 2019.[24] According to this report, minors in Eritrea were being forcibly recruited for military service, the treatment of recruits in Eritrean prisons had not improved, the fate of most persons who had been returned to Eritrea was unknown, and there were reports that many of them had been sent to a prison near Teseney, where torture had been reported.

[20] See also "Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea" (A/HRC/29/CRP.1), para. 1264, available on the website of the Commission of Inquiry (www.ohchr.org/en/hrbodies/hrc/coieritrea/pages/reportcoieritrea.aspx).

[21] Proclamation on National Service (No. 82/1995), 23 October 1995, arts. 14 (2) and (3); and Human Rights Watch, *"They Are Making Us into Slaves, Not Educating Us" – How Indefinite Conscription Restricts Young People's Rights, Access to Education in Eritrea* (August 2019), pp. 46–50.

[22] A/HRC/41/53, paras. 28, 30 and 74; A/HRC/38/50; and A/HRC/RES/38/15, para. 6 (f).

[23] *M.G. v. Switzerland* (CAT/C/65/D/811/2017), para. 7.3.

[24] European Asylum Support Office, *Eritrea National Service, Exit, and Return – Country of Origin Information Report* (September 2019).

State party's additional observations on the merits

6.1 In its additional observations of 26 September 2019, the State party maintains its position and states that it does not carry out forced removals of Eritreans, because Eritrea does not allow such measures to be taken against its nationals. Forced removal of such persons is therefore impossible, which means that there is no need to examine whether it is lawful. However, it is possible for the complainant to leave voluntarily, provided he takes the necessary steps.

6.2 On 9 January 2020, the State party transmitted to the Committee its response, dated 7 January 2020, to the joint request concerning the situation of Eritrean asylum seekers in Switzerland that was made on 19 June 2019 by the Special Rapporteur on the situation of human rights in Eritrea, the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In its response, the State party notes, among other things, that the State Secretariat for Migration continually reviews the situation in Eritrea and adjusts its asylum and removal practices if necessary. The State party then describes in detail how these practices have changed since 2012.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee must decide whether or not 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 does not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint on these or any other grounds. As the Committee finds no obstacles to admissibility, it declares the present complaint admissible and proceeds to its consideration on the merits.

Consideration of the merits

8.1 The Committee has considered the present 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 Committee must first determine whether the removal of the complainant to Eritrea would constitute a violation of the State party's obligation under article 3 of the Convention. The Committee recalls its general comment No. 4 (2017), according to which: (a) 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 that may be at risk of being tortured in the State of destination; and (b) the Committee's practice has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real".[25] It also recalls that the burden of proof is upon the author of the communication, who must present an arguable case, that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when complainants are in a situation where they cannot elaborate on their 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.[26] 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 and will

[25] General comment No. 4, para. 11.

[26] Ibid., para. 38.

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.[27]

8.3 The Committee notes the complainant's claim that, in order to conscript him into the army, soldiers came to his home twice, in vain, and then issued a summons stating that he must go to the school, accompanied by his parents. According to the complainant, the fact that he is a draft evader who left Eritrea illegally puts him at risk of being subjected to torture if he were to be returned to the country. On the other hand, the Committee notes that, according to the State party, there is no indication that there are substantial grounds for fearing that he would face a specific and personal risk of being subjected to torture upon his return to Eritrea, and that his allegations and evidence have been considered to be implausible.

8.4 The Committee notes the course of the complainant's asylum application procedure before the Swiss authorities. In this regard, it 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.[28] The Committee notes that, according to the complainant, the hearings on his reasons for seeking asylum should have been conducted in Saho, not Tigrinya. He claims to have mentioned that his mother tongue was Saho at the hearing with the Swiss authorities concerning his reasons for seeking asylum and to have been told that there were no Saho interpreters available in Switzerland but that one could be called in from Germany. He reportedly then agreed to be questioned in Tigrinya, so as not to delay the proceedings. The Committee notes that, according to the record of the second hearing, the complainant stated that his mother tongue was Tigrinya and that his knowledge of this language had improved since his arrival in Switzerland. He also provided information about his date of birth, ethnicity and religion that was consistent with the information provided in the present communication. According to the record in question, the complainant did not report any problems of communication with his interviewers and confirmed, at the end of the hearing, that he had understood the interpreter. The Committee notes that he requested only one correction to the record of the second hearing, after reading it in Tigrinya. Lastly, the complainant confirmed that his statements had been accurately reflected in the records of the proceedings. Consequently, the Committee considers that in this case, it is unable to conclude from the available information that conducting the hearings in Tigrinya constituted a violation by the State party of the obligation to undertake an effective, independent and impartial review, under article 3 of the Convention.

8.5 As regards the time taken to process his asylum application, the Committee recalls that in its procedure for assessing a non-refoulement claim, the State party should provide the person concerned with fundamental guarantees and safeguards, especially if the person has been deprived of his or her liberty or is in a particularly vulnerable situation, such as the situation of an asylum seeker or an unaccompanied minor.[29] In the present case, the Committee is of the view that the period of 18 months that elapsed between the brief preliminary hearing and the full hearing on the complainant's reasons for seeking asylum does not, in itself, constitute a procedural error in the processing of his application. However, the Committee notes that the complainant claims to have submitted the application at the age of 17 years and 1 month. The Committee also notes that during the brief preliminary hearing on his reasons for seeking asylum, the complainant, who was 17 years old at the time, was assisted by a guardian (legal representative) who had been assigned to him by the Court for Adult and Child Protection of the Canton of Geneva in 2015. The Committee further notes that the second hearing, which took place when the complainant was 18 years old, was held in the presence of an independent representative of a charitable organization but not a guardian or legal representative responsible for assisting the complainant. The Committee also notes that the State party has not explained why the full hearing was not held when the complainant was still a minor and eligible for greater protection on account of his age. In these circumstances, the Committee considers that the time taken to process the application

[27] Ibid., para. 50.

[28] *M.G. v. Switzerland*, para. 7.4.

[29] Committee against Torture, general comment No. 4, para. 40.

constitutes a failure by the State party to meet its obligation to undertake an effective review of asylum applications, under article 3 of the Convention.

8.6 In order to determine whether the complainant is currently at risk of being subjected to torture if he is returned to Eritrea, the Committee must examine the alleged inconsistencies and contradictions in his statements and communications that were mentioned by the national authorities. The Committee deems it appropriate to evaluate the complainant's statements in the light of various reports on the human rights situation in Eritrea; it notes, however, that the reports cited below were published after the Swiss authorities issued their decisions on the complainant's asylum application. The Committee notes that, according to the 2019 report of the Special Rapporteur on the situation of human rights in Eritrea, even though Eritrea and Ethiopia signed a peace agreement in 2018, the human rights situation in Eritrea remains worrying, since, among other things, the duration of national and military service remains indefinite, conscripts are at risk of ill-treatment and abuse, evading conscription can lead to arrest and detention, and the exit visa requirement for those wishing to go abroad has been reinstated.[30] According to this report, the Government of Eritrea indicated in March 2019 that reforms to the military service would begin when it had the resources to create job opportunities for conscripts.[31] More recent reports by non-governmental organizations show that these reforms have not yet been carried out.[32]

8.7 The Committee also notes the findings in the report that was written by the State Secretariat for Migration and published by the European Asylum Support Office in September 2019. According to this report, the national service in Eritrea has a military component and a civilian component.[33] All conscripts first undergo military training and are then assigned either to the military component, under the Ministry of Defence, or to the civilian component, under the responsibility of one of the other ministries. The punishment for desertion, draft evasion and illegal exit continues to be applied arbitrarily and inconsistently by military commanders and other representatives of the security forces.[34] Anecdotal information suggests that deserters and draft evaders are likely to be arrested during round-ups or on their return from abroad and then to be sent to prison for a term that generally ranges from 1 to 12 months. While they are in detention, they may be subjected to torture. Persons who left the country without prior authorization may face higher prison terms of up to 3 years. Returnees who have paid a tax and signed a letter of regret are likely to be arrested and conscripted into the national service after a grace period. No official information on the treatment of deserters, draft evaders and persons who left Eritrea illegally is available. As at August 2019, there were no indications that the signing of the peace agreement with Ethiopia in 2018 had led to more leniency towards these groups.

8.8 The Committee notes that according to the record of the complainant's second hearing, when the national authorities asked the complainant to explain in detail his reasons for seeking asylum, he said that he had left his country in order to continue his education and then find a job. When asked to specify all his reasons for seeking asylum, the complainant said that there had been frequent round-ups and that, as a result, he had not been able to live freely and had had to go into hiding. The Committee considers that the mere fact that a person had multiple reasons for leaving his or her country does not exclude the possibility of that person being at risk of torture in the event of return. The Committee also notes that the complainant gave a detailed account of what he did during the two round-ups that took place in his village a few months before he left the country, and that he was able to answer the other questions about the circumstances surrounding his departure.

[30] A/HRC/41/53, paras. 8, 13 and 26–30. See also A/HRC/38/50, para. 108 (b), (c) and (h); and CCPR/C/ERI/CO/1, para. 37.

[31] A/HRC/41/53, para. 31.

[32] See Human Rights Watch, *"They Are Making Us into Slaves, Not Educating Us" – How Indefinite Conscription Restricts Young People's Rights, Access to Education in Eritrea* (August 2019); and Human Rights Watch, "World Report 2020 – Eritrea: events of 2019".

[33] European Asylum Support Office, *Eritrea National Service, Exit, and Return – Country of Origin Information Report* (September 2019), p. 24.

[34] Ibid., pp. 9–10.

8.9 The Committee considers that the inconsistencies mentioned by the State party and the domestic authorities are not significant enough to cast doubt on the complainant's credibility. For example, the State party notes that during the first hearing, the complainant stated that the round-ups in his village had occurred in May 2015, whereas during the second hearing, he claimed that these round-ups had taken place three or four months before he left Eritrea, that is to say, in February and March 2015. The Committee considers this contradiction to be relatively minor. Furthermore, in view of the lack of information available about the methods of recruitment used to conscript young persons in Eritrea, the Committee considers that the Federal Administrative Court failed to justify its conclusion that it was not plausible that soldiers would have asked the complainant to present himself at school with his parents for the purposes of conscription. As regards the Court's argument that the complainant failed to show that he had been in contact with the military authorities, the Committee considers that the complainant plausibly explained that this lack of contact was due to the fact that he ran away and hid during the round-ups. As to the State party's claim that there is no reason to presume that the complainant would have been affected by these round-ups, the Committee notes that, according to the complainant, round-ups were often carried out in his village. The Committee considers that the complainant's claims regarding round-ups are compatible with the information that is available on the general situation in Eritrea, as described by the State Secretariat for Migration in the report published by the European Asylum Support Office in September 2019.[35] While noting that, according to the State party, the complainant cannot be considered a potential conscript solely on the grounds that he dropped out of school, the Committee considers that, in view of the information that is available on the situation in Eritrea, it is plausible that the complainant was targeted simply because of his age.[36]

8.10 In view of the complainant's claims that soldiers targeted him for conscription twice, prompting him to leave his country illegally; in view of the recent reports concerning the widespread conscription of young people, particularly boys and men, in Eritrea and the possibility that draft evaders and those who left the country illegally may be subjected to torture on their return; and in view of the shortage of reliable information regarding the level of risk involved in such cases, the Committee cannot conclude in the present case that the complainant does not face a foreseeable, real and personal risk of being subjected to torture if he is returned to Eritrea. His return would therefore constitute a violation of article 3 of the Convention by the State party.

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 Eritrea would constitute a breach of article 3 of the Convention by the State party. 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 is of the view that, in accordance with article 3 of the Convention, the State party has an obligation to refrain from forcibly returning the complainant to Eritrea.

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

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[35] European Asylum Support Office, *Eritrea National Service, Exit, and Return – Country of Origin Information Report* (September 2019).

[36] See, inter alia, Human Rights Watch, *"They Are Making Us into Slaves, Not Educating Us" – How Indefinite Conscription Restricts Young People's Rights, Access to Education in Eritrea* (August 2019).