



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

Distr.: General  
1 October 2018

Original: English

## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 783/2016\*, \*\*

<i>Communication submitted by:</i>	H.R.E.S. (represented by counsel, Angela Stettler and Urs Ebnöther)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	15 November 2016 (initial submission)
<i>Date of present decision:</i>	9 August 2018
<i>Subject matter:</i>	Deportation to the Islamic Republic of Iran
<i>Procedural issue:</i>	Lack of substantiation of claims
<i>Substantive issue:</i>	Risk of torture or risk to life, or risk of inhuman or degrading treatment, if deported to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1 The author of the communication is H.R.E.S.,<sup>1</sup> a national of the Islamic Republic of Iran born in 1978. He applied for asylum in Switzerland, but his application was rejected. He claims that his forcible removal to the Islamic Republic of Iran would constitute a violation by Switzerland of article 3 of the Convention, as he fears facing a risk of being subjected to torture, or risk to his life, or inhuman or degrading treatment, in his country of origin, due to his homosexuality and atheism. The complainant is represented by counsel.

1.2 In his communication, the complainant requested that interim measures be granted in order to prevent his removal. On 18 November 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from deporting the complainant to the Islamic Republic of Iran while his complaint was being considered by the Committee.

#### The facts as presented by the complainant

2.1 The complainant is an Iranian citizen. He submits that he has shown signs of “non-conformity with prescribed gender roles” since he was 5 or 6 years old. He claims that when he was a child, he was dressing like a girl and wanted to have the body of a girl. When he was 13 years old, his father caught him dressed like a girl and beat him severely.

\* Adopted by the Committee at its sixty-fourth session (23 July–10 August 2018).

\*\* The following members of the Committee participated in the consideration of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

<sup>1</sup> On 15 December 2017, the complainant requested the Committee not to reveal his identity.



The complainant states that at the age of 15 he had sexual relations with some of his male classmates and later with older men.

2.2 At the age of 19, in 1997, the complainant's father sent him, against his will, to a military camp to perform his compulsory military service. He alleges that he was raped there several times by various sergeants.<sup>2</sup> In this connection, he claims that he became the sex slave of one of the sergeants who caught him with another man and raped him regularly thereafter.<sup>3</sup> He claims that he eventually left the military camp with permission and did not return. He alleges that he lived for six months on the street, where he was abused and raped by older men. At that time, he had suicidal thoughts.

2.3 Later on, the complainant tried to escape the country on a plane to the United Kingdom of Great Britain and Northern Ireland but was caught.<sup>4</sup> Having no other choice, the complainant went back to his family's home. Eventually he attempted to commit suicide, and was hospitalized. After that, his father reported his absconding from military service, to the police. The complainant adds that he was sentenced by a military court to one month's imprisonment and was forced to resume his military service.<sup>5</sup> He also claims that he was gang-raped in prison.<sup>6</sup>

2.4 After serving his sentence, he was sent to the same military camp and was again abused by two sergeants there. He asked for permission to visit his brother and did not return to the military camp. The complainant submits that he then lived again on the street, and was detained again after being caught stealing.

2.5 Once released, the complainant found refuge at his uncle's home, in the north of the country. He decided to "purify his soul" by avoiding food and sex. After two years there he went back to his family, in 2002. His parents convinced him to get married to a woman. The complainant claims that he married his wife in 2001<sup>7</sup> and was divorced from her in 2003.

2.6 The complainant states that his family and his new fiancée forced him to go back to the army. He alleges that, at the military camp, he was threatened with a gun by a commander, as the complainant had discovered that the commander was corrupt. The complainant states that he was consequently arrested and sent to prison for three months.<sup>8</sup>

2.7 The complainant later tried to flee the country several times, but without success. During that time, he continued to have sexual relations with men. Between 2004 and 2009, he worked as a private English teacher and translated students' essays from Farsi to English. With this regular income, he was able to rent an office in Sari, and opened an English conversation club where young students could exchange ideas about current issues in English. The complainant wanted to share his ideas about a secular State and to speak about his reflections on religion, while gathering a group of activists wanting to change traditional Iranian society. He engaged in this activity for only a few months as it was dangerous and also difficult to attract new followers since the group feared oppression from the Iranian authorities.

2.8 Around 2009, the complainant moved to Karaj with his mother. He studied there as an interpreter from 2010 to 2014. The complainant alleges that he had rejected Islam since the age of 15. His opposition to Islamic traditional law was further influenced by the sentencing of his brother to the death penalty in 1999 and his brother's subsequent execution.<sup>9</sup>

---

<sup>2</sup> The complainant does not provide information about whether he was raped because he was homosexual.

<sup>3</sup> The rapes reportedly continued during 1997 and 1998.

<sup>4</sup> There is no information on the precise date of this event.

<sup>5</sup> The complainant does not provide a copy of the sentence or indicate its dates or other circumstances.

<sup>6</sup> The complainant does not specify whether he was raped by prisoners or guards.

<sup>7</sup> There is an inconsistency as the complainant previously stated that he went back to his family in 2002.

<sup>8</sup> The complainant does not attach a copy of any decision.

<sup>9</sup> The complainant explains that his brother killed someone in a fight and was consequently detained in Ghasr Prison in Tehran and was later executed there.

2.9 The complainant submits that in March 2015, he had sex with a 14-year-old minor, who was one of the students to whom he was giving private lessons. When the family of the minor learned about the issue, one of the family members visited the complainant's home but could not find him.<sup>10</sup> The complainant became very anxious, as he feared that the family of the minor would accuse him of rape. He hid for a while, before fleeing to Europe. The complainant alleges that he entered Switzerland on 20 August 2015, after travelling through several European countries.<sup>11</sup> On the same day, he applied for asylum in Switzerland.<sup>12</sup> Since then, he claims to have been going to gay clubs in Switzerland and to have started a relationship with a man whom he met at the refugee centre.

2.10 Once in Switzerland, the complainant contacted Queer Amnesty (a division of Amnesty International) and requested a representative of that organization to visit him in detention.<sup>13</sup> The complainant attaches a letter from Queer Amnesty describing his resolve, if sent back to the Islamic Republic of Iran, to counter Islamic fanaticism and to influence as many people as possible to fight for freedom of religion.

2.11 On 24 August and 12 October 2015, the complainant was interviewed by the State Secretariat for Migration. On 4 November 2015, the State Secretariat for Migration rejected his asylum application,<sup>14</sup> finding that the rapes allegedly endured by the complainant during his military service in 1997 and 1998 were not relevant, as he did not leave the Islamic Republic of Iran until 2015. The State Secretariat for Migration was of the view that it did not seem probable that the complainant had any problems with the Iranian authorities, and that there was no reason to believe that the authorities were aware about his sexual orientation or would learn about it in the future as the complainant had indicated that he had not had homosexual relationships since he had finished his studies and that he had partly given up on his intimate life.<sup>15</sup> The Swiss authorities considered that the threshold for collective persecution of homosexuals in the Islamic Republic of Iran had not been met for the moment. The State Secretariat for Migration also affirmed that the Iranian authorities were unaware of his atheism, and that there was no reason for them to discover it as the complainant was not a public activist. Finally, the State Secretariat for Migration argued that the complainant had not claimed during any of the interviews to have suffered from any psychological or other health problems.

2.12 The complainant filed an appeal against the decision of the State Secretariat for Migration to the Swiss Federal Administrative Court on 15 November 2015. The judgment, dated 17 December 2015,<sup>16</sup> upheld the conclusions of the State Secretariat for Migration. The court upheld the fact that the complainant had not had any problems with the Iranian authorities prior to his departure and noted that the complainant's abstinence was self-determined.

2.13 The complainant adds that he has been treated by a psychiatrist, from 10 December 2015 to May 2016, and attaches two medical reports<sup>17</sup> and a letter from Queer International

<sup>10</sup> The family member referred to only found the complainant's brother.

<sup>11</sup> Namely Greece, the former Yugoslav Republic of Macedonia, Serbia and Hungary. However, the complainant does not indicate at this stage whether he crossed the Swiss border on foot or arrived by plane.

<sup>12</sup> The complainant did not disclose information about his sexual orientation to the Swiss authorities during the asylum proceedings.

<sup>13</sup> The complainant does not explain what type of detention he refers to; his internment in a refugee centre, or some other kind.

<sup>14</sup> The complainant attaches a copy of the official decision in German as well as an unofficial executive summary in English.

<sup>15</sup> According to the complainant's translation of the decision, the State Secretariat for Migration reported that during the proceedings, the complainant stated that sexuality was not so important for him anymore.

<sup>16</sup> The complainant attaches a copy of the original decision in German as well as an unofficial executive summary in English.

<sup>17</sup> The complainant attaches two medical reports (dated August and November 2016) in German from Dr. Laszlo Urogi. Dr. Urogi confirms the complainant's claim about his state of mental health, which requires urgent treatment for an undetermined period that could take a number of years. Dr. Urogi states that he is not aware whether the required treatment would be available to the complainant in the

corroborating his statements.<sup>18</sup> He indicates that he was hospitalized for one week in a psychiatric centre in Zurich<sup>19</sup> because of a psychiatric crisis. The complainant submits that he was diagnosed with major depressive and post-traumatic stress disorders, as well as severe behavioural, affective and gender-identity disorders. He had to take medicine to treat his suicidal thoughts. The state of his mental health required him to continue the psychiatric therapy for an undetermined period.

2.14 On 31 December 2015, the State Secretariat for Migration directed the complainant to leave Switzerland before 9 January 2016. On 22 April and 28 June 2016, the Swiss authorities attempted to return the complainant by plane to the Islamic Republic of Iran, but he did not present himself at the airport, hence the flights were cancelled.<sup>20</sup> The complainant affirms that his complaint has not been and is not being examined under another procedure of international investigation or settlement.

### The complaint

3.1 The complainant claims that Switzerland would violate its obligations under article 3 of the Convention if it forcibly removed him to the Islamic Republic of Iran, since he fears facing a risk of being subjected to torture, or risk to his life, or inhuman or degrading treatment, in his country of origin, due to his homosexuality and atheism.

3.2 The complainant claims that he has been homosexual from a very young age. He submits that the State party's authorities never questioned him during the asylum interview about his sexual orientation or challenged the credibility of any statements regarding his homosexuality. The complainant considers that the asylum authorities did not effectively assess the possible risks of ill-treatment if removed. Contrary to the findings of the State Secretariat for Migration, the complainant asserts that he only had to conceal his sexual orientation at school, as he feared persecution.<sup>21</sup> He therefore claims that the authorities wrongly held that this abstinence was self-determined, given that it was, rather, imposed on him. In this connection, the complainant refers to a decision of the Court of Justice of the European Union, of 2013,<sup>22</sup> which considered that it could not be expected from asylum seekers to conceal their homosexuality in their country of origin to avoid persecution, as that would be incompatible with the recognition of a characteristic so fundamental to a person's dignity. In addition to this, the complainant submits that he had sexual relations after the end of his studies with an adult man in the Islamic Republic of Iran, but did not want to admit it during the asylum proceedings, also because he had had a subsequent homosexual relationship which involved a minor.

3.3 The complainant claims that, at present, he wants to live openly as a homosexual. He argues that he is still interested in sexual relations even if he stated the opposite during the interviews.<sup>23</sup> He submits that he wishes to live with pride about his sexuality, as he was

---

Islamic Republic of Iran. However, stopping the complainant's psychiatric therapy would be detrimental for him, given that he has suicidal thoughts.

<sup>18</sup> The complainant also attaches to his communication a letter from Queer Amnesty, dated August 2016, stating that he suffers from mental disorder.

<sup>19</sup> This appears to be a detoxification centre.

<sup>20</sup> The State party did not try to forcibly deport the complainant after the Committee's request for interim measures on 18 November 2016.

<sup>21</sup> The complainant submits that he stated several times during the interviews with the State Secretariat for Migration that he could not live as he wanted in his country of origin due to the regime and the predominance of Islam. He adds that, during an interview, in answer to a question about the reasons why he had to conceal his sexual orientation, he said that firstly it was prohibited in his country of origin, and secondly it would have been shameful for his family. He also submits that he has not tried to get in touch with his family.

<sup>22</sup> *Minister voor Immigratie en Asiel v. X, Y and Z*, C-199/12, C-200/12 and C-201/12, 7 November 2012.

<sup>23</sup> The complainant claims that what he indicated during the interviews has been wrongly understood. He might have stated during the interviews that his sexual orientation was not so important to him anymore because he had never experienced any healthy relationship but only rape and intercourse. He also adds that this statement can be understandable from a psychological point of view, considering the post-traumatic disorders he was going through.

going to homosexual community places in Switzerland and had started a relationship with a man there.

3.4 The complainant claims that his asylum application was wrongly dealt with under the accelerated procedure by the State party's authorities, with both interviews with the State Secretariat for Migration having been held within a period of one and a half months. He refers to the guidelines of the Office of the United Nations High Commissioner for Refugees, which indicate that the accelerated proceedings are not suitable for processing asylum applications on grounds of sexual orientation or gender identity. He also complains about errors in the proceedings, notably the fact that his counsel was replaced by another counsel just before the second interview, which was when he met the new counsel for the first time. He alleges that his counsels stated that he had psychological problems, but failed to hand over the medical reports supporting his claims. He submits that his counsels failed to file a motion for an additional interview, although the complainant had stated during the first interview that his story was long and would require two full days to be told in detail.

3.5 Furthermore, the complainant claims that he will be particularly at risk as he does not follow the official religion of the Islamic Republic of Iran. He submits that he had an office in his country of origin to spread his ideas, that his neighbours are aware of the fact that he is an atheist, and that he wants to dedicate his life to fighting against religious fanaticism, regardless of where he resides in the future. The complainant fears the risk of being punished and subjected to torture or other ill-treatment in the Islamic Republic of Iran, since article 22 of the country's Penal Code allows judges to convict individuals for apostasy.

3.6 Lastly, concerning the foreseeable, real and personal nature of the risk of being tortured upon return to the Islamic Republic of Iran, the complainant insists that he previously suffered torture when he was repeatedly raped during his military service. In support of his claim, the complainant quotes the report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran<sup>24</sup> which denounces "the use of torture and other cruel, inhuman or degrading treatment" such as "amputations, blinding and flogging as a form of punishment". In particular, the complainant refers to several other reports<sup>25</sup> on the persecution of homosexuals in the Islamic Republic of Iran. He also makes a reference to the provision in Iranian law which prohibits sodomy and provides for the death penalty as punishment for this crime.<sup>26</sup> The complainant further claims that corporal punishment is used in the Islamic Republic of Iran to punish homosexual acts such as kissing and touching.<sup>27</sup>

#### **Additional information from the complainant**

4.1 On 15 December 2017, the complainant submitted additional information to the Committee to support his claim of a personal risk of torture if deported. He requested anonymity in regard to his identity. He drew attention of the Committee to a recent decision of the Federal Administrative Court of the State party<sup>28</sup> in which it was found that an apostate was at a personal risk of ill-treatment upon deportation to Afghanistan.

4.2 He requested the Committee to treat his case as a priority, taking into account the negative impact of a risk of deportation on his health. He admitted feeling very unsafe at the asylum centre where he stayed, as some other inmates were homophobic and intolerant towards non-believers. He recalls that, since his arrival in the State party, he has already been hospitalized in a psychiatric centre for one week.

<sup>24</sup> A/71/418, para. 22.

<sup>25</sup> Among others: Human Rights Watch, "Lesbian, gay, bisexual and transgender people are subjected to official harassment, arbitrary arrest and detention, prosecution and ill-treatment or torture" (2016). The report is available at [www.hrw.org/world-report/2016/country-chapters/iran](http://www.hrw.org/world-report/2016/country-chapters/iran).

<sup>26</sup> Articles 233 and 234 of the Iranian Penal Code.

<sup>27</sup> Article 237 of the Iranian Penal Code provides that such acts shall be punished by 31 to 74 lashes.

<sup>28</sup> Judgment D-4952/2014 of 23 August 2017.

### State party's observations on the merits

5.1 On 18 May 2017, the State party submitted its observations on the merits, recalling first the facts and the asylum proceedings undertaken by the complainant in Switzerland. It notes that the asylum authorities have duly considered the complainant's arguments, without any procedural flaws. In the State party's view, the communication does not include any new information that would invalidate the asylum authorities' decisions. It therefore holds that the deportation of the complainant to the Islamic Republic of Iran would not constitute a violation of article 3 of the Convention by the State party.

5.2 The State party points out that, under article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing 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. For the purpose of determining whether there are such grounds, the competent authorities are to take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. Referring to the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, the State party claims that the complainant must establish the existence of a personal, present and substantial risk of being subjected to torture upon return to his or her country of origin. There must be grounds for describing the risk of torture as "substantial".<sup>29</sup> The State party recalls that the following elements must be taken into account to ascertain the existence of such a risk: any 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 of the complainant in the recent past and independent evidence to support those claims; political activity of the complainant within or outside the country of origin; any evidence as to the credibility of the complainant; and any factual inconsistencies in the complainant's claims.<sup>30</sup> The State party presents its observations in the light of these factors.

5.3 The State party points out that the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not, in itself, constitute sufficient grounds for determining that a particular person would be subjected to torture upon return to his or her country of origin. Rather, the Committee must establish whether the complainant is personally at risk of being subjected to torture in the country to which he or she would be returned. Additional grounds must be adduced in order for the risk of torture to qualify as "foreseeable, real and personal" for the purposes of article 3 (1) of the Convention. The existence of such a risk must be assessed on grounds that go beyond mere theory or suspicion.

5.4 Regarding the existence of a consistent pattern of gross, flagrant or mass violations of human rights, the State party acknowledges that the mere fact of being homosexual establishes a high risk of being persecuted in the Islamic Republic of Iran. However, the country's Penal Code does not criminalize homosexuality in and of itself, but only some homosexual acts. In this regard, the State party emphasizes that it is not possible to precisely assess the number of homosexuals against whom the death penalty has been carried out.<sup>31</sup> Accordingly, the situation in the complainant's country of origin does not constitute, in itself, sufficient grounds for concluding that the complainant would be at risk of torture if he were to be returned there. The State party alleges that homosexuals who conceal their homosexuality and keep a low profile can live freely in Iranian society.

5.5 As regards the allegations of torture of the complainant in the past, the State party underlines that the alleged sexual abuses mentioned by the complainant occurred in 1997, during his military service — more than 20 years ago. Therefore, those events cannot be linked to the complainant's departure for Europe in 2015. The State party also points out the fact that the complainant left the Islamic Republic of Iran in 2004 and stayed for two

---

<sup>29</sup> See the Committee's general comment No. 1, paras. 6 and 7, which has been replaced, with effect from 6 December 2017, by its general comment No. 4 (2017) on the implementation of article 3 in the context of article 22.

<sup>30</sup> See the Committee's general comment No. 1, para. 8.

<sup>31</sup> The State party refers to a decision of its domestic court, namely TAF (D-7383/2015 of 17 December 2015).

weeks in Turkey without applying for a visa. It argues that the complainant did not fear being subjected to torture in the Islamic Republic of Iran, otherwise he would not have returned to the Islamic Republic of Iran two weeks later.

5.6 The State party recalls the complainant's statement that he stopped having homosexual relationships after finishing high school (from the age of 19) because of the general prohibition on this activity in his country and because he wanted to preserve the reputation of his family. The State party notes that the mere fact that homosexuality is generally prohibited in the Islamic Republic of Iran is not sufficient to establish that the complainant would face ill-treatment due to his homosexuality. It recalls that the complainant's decision to abstain from homosexual activity after finishing high school was a self-determined choice.

5.7 The State party further notes that the complainant did not encounter specific conflicts or problems with Iranian authorities. It submits that while the complainant was in the Islamic Republic of Iran, he did not express his homosexuality in the public sphere. For these reasons, it can be assumed that the Iranian authorities are not aware of the complainant's homosexuality. The State party also recalls that during his interview with the State Secretariat for Migration, he stated that his sexuality was not important for him anymore.

5.8 Regarding the alleged political activity of the complainant in his country of origin, the State party highlights the complainant's statement that he would like to fight against religious fanaticism in Iranian society. The State party claims that the Constitution of the Islamic Republic of Iran does not criminalize apostasy, although it is punishable by the death penalty under sharia law which Iranian judges may apply. Moreover, it recalls that the complainant never encountered oppression or persecution from the Iranian authorities for his ideas, and believes that he mainly developed them in the private sphere. The State party also points out that the complainant did not actively engage in the Islamic Republic of Iran as an atheist, and highlights the fact that he did not submit that he had been engaging in any political activities since his arrival in Switzerland.<sup>32</sup>

5.9 The State party also emphasizes the inconsistencies of the complainant's statements, which impugn the credibility of his submissions. For example, the complainant claims that one of the reasons why he fled the Islamic Republic of Iran was because he had had sex with a minor and feared being accused of rape by the partner's family. However, the State party recalls that the complainant did not provide this information to the State Secretariat for Migration during the first interview, but only during the second interview, although it appears to be a decisive reason for his departure. Moreover, the State party claims that the complainant initially submitted, during the first interview, on 12 October 2015, that he had entered Europe by crossing the border on foot. However, during the second interview, on 15 November 2015, the complainant alleged that he had arrived in Europe by plane.

5.10 The State party notes that the complainant submitted that his entire family and the family of his former wife were aware of his homosexuality. Nonetheless, he failed to demonstrate that he had suffered persecution from the Iranian authorities in the recent past due to his sexual orientation, and that he risked being subjected to torture for the same reason if he were deported to the Islamic Republic of Iran.

5.11 In conclusion, the State party considers that the complainant has failed to establish serious grounds that would demonstrate a personal risk of being subjected to torture if he were deported to the Islamic Republic of Iran. Accordingly, the State party invites the Committee to declare that the removal of the complainant to the Islamic Republic of Iran would not constitute a violation of its international obligations under article 3 of the Convention.

---

<sup>32</sup> The complainant submitted information about his political activities in the State party on 19 April 2018, following the State party's observations.

### **Complainant's comments on the State party's observations**

6.1 On 19 April 2018, the complainant submitted his comments on the State party's observations. He alleges that the State party's submission that he did not have homosexual relationships after the age of 19 or 20 is not correct. He recalls that he stated in his initial complaint that he had had, after that age, a relationship with a man in the Iranian city of Bandar Abbas, and another in 2015, with one of his male minor students. He insists that the only reason why he concealed his homosexuality during his studies was that he feared persecution from the Iranian authorities. He submits, for instance, that while he was studying, some homosexuals were arrested at gay gatherings. He concludes that his abstinence for a short period was not self-determined, opposing the finding of the Federal Administrative Court, but rather was imposed on him because of the Islamic society in his country of origin. He holds that since the State party does not formally challenge his version of events, the Committee should give due consideration to the facts as presented in his initial communication.

6.2 The complainant reiterates that his asylum application was not examined effectively under the accelerated procedure, during which he was interviewed twice in a period of six weeks. He also claims that the State party's authorities did not properly evaluate the risk of torture if he were deported to the Islamic Republic of Iran, given that he wanted to live openly as a gay man and an atheist. Moreover, the State party's authorities did not take into account the particular circumstances of his case, namely the fact that he had had to hide his homosexuality for most of his life and that he had even ended up thinking, at some point, that he had to suppress it. He argues that presently he wants to live openly as gay regardless of the country in which he resides.

6.3 The complainant claims that his earlier statement, to the authorities of the State party, that sexuality was not very important to him anymore, can be explained by the numerous traumas that he experienced due to his sexual orientation. He points out that his health condition can be attested to by the medical certificate attached to his initial communication. He also argues that the State party failed to take into consideration the recent public expression of his sexual orientation in Switzerland, where he can live freely as a gay man.

6.4 The complainant also submits that the State party's authorities emphasized the fact that he had concealed his homosexuality at some point in his life, in order for it to be established that in case of return he could live there again by behaving the same way. However, he argues that the State party cannot expect him to hide his sexual orientation in the Islamic Republic of Iran in order to avoid persecution.

6.5 He adds that the State party acknowledged that both apostasy and certain homosexual acts were punishable by the death penalty in the Islamic Republic of Iran, while concluding, however, that the complainant may live there happily as a gay man and an atheist in the private sphere, invoking a "discretion argument".<sup>33</sup> He claims that this argument is inadmissible according to the approach of the European Court of Human Rights,<sup>34</sup> considering that individuals submitting a request for international protection based on their sexual orientation could not be required to hide it. The complainant therefore concludes that it was relevant to assess whether he personally risked torture in the Islamic Republic of Iran as an openly gay man and an atheist. He claims to have established a personal risk of being subjected to torture if returned, due to a combination of his personal circumstances and the situation in the Islamic Republic of Iran.

6.6 The complainant recalls that even though the past experience of torture in his country of origin occurred several years ago, it had to be taken into account when assessing his case, according to the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22.<sup>35</sup> In addition, he insists on the fact that the last time he was abused in the Islamic Republic of Iran was not in 1998, but later,

---

<sup>33</sup> The State party argues that the complainant could hide his homosexuality in the public sphere, without impacting on his private life.

<sup>34</sup> The complainant refers to the European Court of Human Rights case *I.K. v. Switzerland* (application No. 21417/17), judgment of 18 January 2018, para. 24.

<sup>35</sup> See para. 29 (b) and (c).



as stated during the interview with the State Secretariat for Migration, as he was gang-raped in prison.<sup>36</sup> The complainant also explains that he returned to the Islamic Republic of Iran after having spent two weeks in Turkey because he no longer had any resources and was living on the street. Not having available to him any legal advice on the matter, he did not know that he could apply for asylum there.

6.7 The complainant argues that the State party's submission that he did not spread his atheist opinions publicly is wrong, given that he had an office in the Islamic Republic of Iran where he held regular meetings to exchange such ideas. He further recalls that, as stated during his first interview with the State Secretariat for Migration, he publicly insulted the Prophet Muhammad once in front of his neighbours during a religious gathering. He also notes that he even burned a Qur'an while in a detention centre in the State party, and indicates that he would not be able to hide his ideas in the Islamic Republic of Iran where he would be subjected to corporal punishment for apostasy and blasphemy.

6.8 He further asserts that he became very active in the State party contacting associations fighting against fanaticism. He even created an online blog where he criticizes Islam and challenges the existence of God.<sup>37</sup> The complainant has actively participated in the activities of an atheist association in the State party called Free Thinkers.<sup>38</sup> He also recently recounted his story as an Iranian gay man and atheist during a meeting of the Säkulare Migranten ("secular migrants") association.

6.9 In reference to the State party's argument that the complainant disclosed his sexual relationship with one of his students only during the second interview with the State Secretariat for Migration, the complainant explains that he was ashamed of his homosexuality and considered that this behaviour was also prohibited in the State party. He contends that he was not able to build up the necessary trust to tell the interrogator about it during the first asylum interview. He also argues that he never intended to pretend that he came to Europe by air, since he reiterates that he crossed the border on foot. In that regard, he explains that the word "flight" in his statement was not meant to refer to air transportation, but generally to the idea of fleeing the country.

6.10 The complainant concludes that his deportation to the Islamic Republic of Iran would expose him to a personal risk of being subjected to torture and his life would be in danger, on account of being openly gay and atheist. If he were removed, he would probably be arrested at the airport in Tehran, to be interrogated by the revolutionary forces about his long stay abroad. He claims to have demonstrated a risk of irreparable harm. Accordingly, he submits that the State party's authorities failed to carry out an individual and thorough risk assessment when considering his asylum application.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

7.1 Before considering any claim submitted in a communication, the Committee must decide whether the communication 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 shall not consider any communication from an individual unless it has ascertained that the

<sup>36</sup> The complainant does not provide a specific date, though. However, according to his initial statements of facts, he was detained on an unknown date between 1997 (the first time that he was sent to the military camp to perform his military service) and 2002 (when he came back to his family's home and married his wife).

<sup>37</sup> The complainant provides a weblink to visit his blog.

<sup>38</sup> The complainant attaches a letter from the current president of the association, confirming the complainant's active and public participation in the activities of Free Thinkers Winterthur. The association is comprised of public figures who are known for their efforts to combat fanaticism in the Islamic Republic of Iran.

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 communication on this ground.

7.3 The Committee considers that the communication, wherein the complainant claims to face a risk of being subjected to torture, or risk to his life, or inhuman or degrading treatment, if removed to the Islamic Republic of Iran, due to his sexual orientation, atheism and activities in support of a secular State, raises substantive issues under article 3 of the Convention, as the facts and the basis of the complainant's claims have been adequately substantiated for the purpose of admissibility.<sup>39</sup> In the absence of any objection from the State party as to the admissibility of the present communication, the Committee finds no obstacle to admissibility and declares it admissible.

#### *Consideration of the merits*

8.1 The Committee has considered the complaint 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 removal of the complainant to the Islamic Republic of Iran would constitute a violation of the State party's obligation under article 3 (1) 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.

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 the Islamic Republic of Iran. The Committee notes that, since the Islamic Republic of Iran is not a party to the Convention, in the event of a violation of the complainant's Convention rights in that State, he would be deprived of the legal option of recourse to the Committee for protection of any kind.<sup>40</sup>

8.4 The Committee must take into account all relevant considerations in assessing the alleged risk of torture, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of the determination is to establish whether the complainant 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.<sup>41</sup>

8.5 The Committee recalls its general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, according to which the Committee will assess "substantial grounds" and consider the risk of torture as foreseeable, personal, present and real when the existence of facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his or her deportation. Indications of personal risk may include, but are not limited to: (a) the complainant's ethnic background; (b) the political affiliation or political activities of the complainant and/or the complainant's family members; (c) an arrest warrant having been issued against the complainant without a guarantee of fair treatment and a fair trial; and (d) the complainant being sentenced in absentia. With respect to the merits of a communication submitted under article 22 of the Convention, the burden of proof is upon the author of the communication, who has to present an arguable case, that is, to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present,

---

<sup>39</sup> See, inter alia, *K.A. v. Sweden* (CAT/C/39/D/308/2006), para. 7.2.

<sup>40</sup> See, for example, *Tahmuresi v. Switzerland* (CAT/C/53/D/489/2012), para. 7.7. See also *R.H. v. Sweden* (CAT/C/63/D/750/2016), para. 8.8.

<sup>41</sup> See, for example, *E.K.W. v. Finland* (CAT/C/54/D/490/2012), para. 9.3.

personal and real.<sup>42</sup> The Committee also recalls that it 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.<sup>43</sup>

8.6 In assessing the risk of torture in the present case, the Committee notes the complainant's claims that he risks being subjected to torture in the Islamic Republic of Iran because of his sexual orientation, the fact that he is an atheist and because of his activities in support of a secular State. It also notes that the complainant maintains that he was sexually abused, several times, by different sergeants during his military service in the Islamic Republic of Iran. He alleges that, as a consequence, he suffered from mental disorder and suicidal thoughts, which are corroborated by medical reports. Additionally, the Committee takes note of the complainant's submissions that he opened a conversation club in the Islamic Republic of Iran to promote atheism and to spread his ideas about a secular State, that his former neighbours are aware of the fact that he is an atheist, and that since his arrival in Switzerland he has actively engaged in the fight against Islamic fanaticism in his country of origin. The Committee further observes the complainant's claims that he has engaged in homosexual relationships since the age of 15, both in the Islamic Republic of Iran and in Switzerland.

8.7 The Committee notes that the State party recognizes the legitimate concern that can be expressed regarding the human rights situation in the Islamic Republic of Iran. The Committee recalls that the most recent report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran shows that the country's legislation continues to authorize punishments such as flogging and amputations of individuals convicted of certain offences.<sup>44</sup> The report stresses, for example, that the Government of the Islamic Republic of Iran rejects the notion that amputations and floggings amount to torture and maintains that they are effective deterrents to criminal activity. The Committee also notes that the State party itself acknowledged that the mere fact of being homosexual establishes a serious risk of being persecuted in the Islamic Republic of Iran, claiming that the country's Penal Code does not criminalize homosexuality in and of itself but only some homosexual acts (see para. 5.4 above).

8.8 The Committee further notes the State party's argument that the occurrence of flagrant and systematic violations of human rights in the country of origin cannot, in itself, constitute sufficient reason to conclude that the complainant would be at risk of being subjected to torture if removed to the Islamic Republic of Iran. It also notes the State party's claim that, regardless of the generally volatile security and human rights situation in his country of origin, the complainant has not demonstrated to the Swiss asylum authorities that he would face a personal risk of being subjected to torture if removed to the Islamic Republic of Iran due to his homosexuality, the fact that he is an atheist, or his political opinions or activities.

8.9 The Committee observes that the complainant has not expressly stated that the sexual abuses suffered during his military service were perpetrated against him because of his sexual orientation or atheism, and that he has not reported being insulted or threatened on the same grounds after those events, which occurred, according to the complainant's submissions, on unspecified dates in 1997 and 1998. The Committee also notes the State party's assertion that those events cannot be linked to the complainant's departure for Europe in 2015. In this connection, the Committee reiterates that although past events may be of relevance, the principal question before the Committee is whether the complainant currently runs a risk of torture if returned to the Islamic Republic of Iran.<sup>45</sup> Accordingly, the Committee considers that the complainant has failed to establish the existence of a present risk of torture.

<sup>42</sup> See *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

<sup>43</sup> See the Committee's general comment No. 4, para. 50.

<sup>44</sup> A/HRC/37/68, para. 29.

<sup>45</sup> See, for example, *S.S. v. Australia* (CAT/C/61/D/720/2015), para. 9.6; and *G.B.M. v. Sweden*, (CAT/C/49/D/435/2010), para. 7.7.

8.10 The Committee takes note of the complainant's medical certificates from 2016, which indicate that he was suffering from post-traumatic stress disorder and suicidal thoughts and that his state of mental health required the continuation of psychiatric therapy. The Committee observes, however, that there is insufficient evidence to determine the cause of the mental disorder with regard to the alleged acts of torture,<sup>46</sup> and to conclude that the current state of the complainant's mental health — given that the latest medical certificates were issued two years ago — prevents the State party from deporting him to the Islamic Republic of Iran.

8.11 The Committee takes note of the State party's arguments that while in the Islamic Republic of Iran, the complainant did not express his homosexuality in the public sphere. It also notes the complainant's claim that his abstinence was imposed on him rather than self-determined, and that he cannot be expected to conceal his homosexuality in the Islamic Republic of Iran to avoid persecution. However, the Committee also notes the State party's submission that the mere fact that homosexuality is generally prohibited in the Islamic Republic of Iran is not sufficient to establish that it constitutes a risk for ill-treatment. In this context, the Committee observes that the complainant has not claimed that the Iranian authorities were aware of his sexual orientation, atheism and political opinions, or that he would express his homosexuality in the public sphere. Moreover, the Committee notes that the State party considered the inconsistencies in the complainant's statements during the asylum interviews as impugning the credibility of his assertions, and that the complainant explained such inconsistencies citing the lack of trust.

8.12 As regards the complainant's claims of flaws during the asylum procedures, the Committee observes the State party's view that the asylum procedures were objective and that there were no signs of arbitrariness or denial of justice. Accordingly, the Committee considers that the complainant has not submitted convincing evidence for it to conclude that the national asylum proceedings, which were reviewed by the Federal Administrative Tribunal, suffered from any irregularities.

8.13 Regarding the complainant's political activities, the Committee further notes the State party's claim that the complainant did not actively and publicly defend his ideas and believes that he mainly developed them in the private sphere,<sup>47</sup> and that he has never encountered oppression or persecution from the Iranian authorities for his opinions. The Committee also notes the complainant's submission reporting his recent political activities in the State party, where he created an online blog to share his ideas of a secular State for his country of origin and participated in the activities of an atheist association. However, the Committee considers that the complainant has not substantiated his claim that he would have a particular political profile that would make him a target for persecution. In the Committee's view, the complainant has also failed to adduce sufficient evidence about the conduct of political activity of such significance that he would attract the interest of the Iranian authorities. Neither has he submitted — for the purposes of establishing that he would face a personal risk of being tortured if returned to the Islamic Republic of Iran — any other evidence suggesting that the authorities in his country of origin, such as the police or other security services, have been looking for him.<sup>48</sup>

8.14 As to the complainant's allegation that he would be arrested and interrogated upon return to the Islamic Republic of Iran due to his long stay abroad, the Committee recalls that the mere risk of being arrested and interrogated is not sufficient to conclude that there is also a risk of being subjected to torture.<sup>49</sup> The Committee recalls that the occurrence of human rights violations in the complainant's country of origin is not, of itself, sufficient for it to conclude that a complainant is personally at risk of being tortured. On the basis of the information before it, the Committee concludes that the complainant has not provided proof that his homosexuality, atheism, political opinions or activities are of such significance as to attract the interest of the authorities of his country of origin.

---

<sup>46</sup> See, for example, *D.R. v. Switzerland* (CAT/C/63/D/673/2015), para. 7.6.

<sup>47</sup> See, for example, *R.H. v. Sweden* (CAT/C/63/D/750/2016), para. 8.7.

<sup>48</sup> See, for example, *I.E. v. Switzerland* (CAT/C/62/D/683/2015), para. 7.6.

<sup>49</sup> See, for example, *P.Q.L. v. Canada* (CAT/C/19/D/57/1996), para. 10.5.

9. In the light of the foregoing, the Committee considers that the information submitted by the complainant is insufficient to establish his claim that he would face a foreseeable, real, personal and present risk of torture if he were removed to the Islamic Republic of Iran.

10. Accordingly, the Committee, acting under article 22 (7) of the Convention, concludes that the removal of the complainant to the Islamic Republic of Iran would not constitute a violation of article 3 of the Convention by the State party.

---