



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

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**Committee against Torture**

**Communication No. 438/2010**

**Decision adopted by the Committee at its fifty-first session,  
28 October to 22 November 2013**

<i>Submitted by:</i>	M.A.H. and F.H. (represented by counsel, Tarig Hassan)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	15 November 2010 (initial submission)
<i>Date of present decision:</i>	7 November 2013
<i>Subject matter:</i>	Expulsion of the complainants to Tunisia
<i>Substantive issue:</i>	Risk of torture upon return to the country of origin
<i>Procedural issue:</i>	-
<i>Article of the Convention:</i>	3

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\* Reissued for technical reasons on 3 January 2014.



## Annex

### **Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-first session)**

concerning

#### **Communication No. 438/2010**

*Submitted by:* M.A.H. and F.H. (represented by counsel, Tarig Hassan)

*Alleged victims:* The complainants

*State party:* Switzerland

*Date of complaint:* 15 November 2010 (initial submission)

*The Committee against Torture*, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Meeting* on 7 November 2013,

*Having concluded* its consideration of complaint No. 438/2010, submitted to the Committee against Torture on behalf of M.A.H. and F.H. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Having taken into account* all information made available to it by the complainants, their counsel and the State party,

*Adopts* the following:

#### **Decision under article 22, paragraph 7, of the Convention against Torture**

1.1 The complainants are M.A.H. (born in 1953) and his spouse, F.H. (born in 1957), both Tunisian nationals. Their asylum applications were rejected in Switzerland and, at the time of submission of the complaint, they were awaiting expulsion to Tunisia. They claim that their expulsion to Tunisia would constitute a violation, by Switzerland, of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainants are represented by counsel, Tarig Hassan.

1.2 On 29 November 2010, under rule 114, paragraph 1 (former rule 108, paragraph 1), of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party to refrain from expelling the complainants to Tunisia while their complaint was under consideration by the Committee. On 30 November 2010, the State party informed the Committee that the Federal Office for Migration had requested the competent authorities to stay the execution of the expulsion order in relation to the complainants until further notice.

### **The facts as presented by the complainants**

2.1 The complainants lived in Tunisia until September 2000. In 1998, the first complainant, together with two friends, supported families of political prisoners and the Ennahda political party, including L.S., the party's leader, who was released in November 2007. In September 2000, the complainant's friends were arrested by the Tunisian secret service; shortly thereafter the second complainant's shop was searched. Fearing persecution, the complainants decided to leave the country.

2.2 On 7 October 2000, the complainants departed from Tunisia and travelled to Switzerland where they filed an application for asylum on 12 October 2000. While they were in Switzerland, several summonses were sent to their home in Tunisia. On 10 June 2002, the Swiss Federal Office for Refugees (now the Federal Office for Migration) rejected their application and ordered their expulsion. On 20 October 2002, the complainants asked for a reconsideration of the negative decision, providing new evidence. On 7 November 2002, the Office for Refugees rejected the request. On 5 December 2005, the Swiss Asylum Appeal Commission, (now replaced by the Swiss Federal Administrative Court) rejected the complainants' appeal. On 18 January 2006, the complainants filed another request for reconsideration with the Federal Office for Refugees, which the latter decided not to consider on its merits on 27 February 2006. On an unspecified date, the Federal Administrative Court rejected the complainants' appeal on formal grounds as they failed to pay related costs. On 7 December 2006, the complainants were repatriated to Tunisia.

2.3 Upon arrival in Tunisia, the complainants were stopped and questioned separately by officials. Since the first complainant was in very poor health, he was not arrested but admitted to hospital for a day. The second complainant was given a summons from the Tunisian secret service for both of them. They complied with the summons and were interrogated. The second complainant was further summoned and interrogated again as to her husband's contacts in Switzerland and was warned that he was not allowed to leave the country. The first complainant was interrogated at the Ministry of the Interior as to whether he had supported the families of political prisoners and whether he had been in contact with politically active Tunisians in Switzerland. He was not arrested on health grounds but placed under police surveillance. The police visited the complainants' house twice a week over several months. In addition, the complainants were called for questioning to a police station. According to the first complainant, the authorities suspected him of Ennahda membership and of being in contact with its leader, L. S. Under strong psychological pressure, the complainants left Tunisia for Libya, on fake passports, on 21 July 2007.

2.4 On 30 July 2007, the complainants returned to Switzerland and filed another application for asylum. On 1 and 27 August 2007 and 22 April 2008, they were questioned by the Swiss asylum authorities. On 8 September 2008, the Federal Office for Migration rejected their application and ordered their expulsion. Counsel subsequently appealed the decision. On 29 October 2010, the Federal Administrative Court dismissed the appeal. On 4 November 2010, the Office for Migration issued an order for the complainants to leave Switzerland by 2 December 2010.

2.5 The complainants submit that the Swiss asylum authorities did not find their accounts credible for the following reasons. First, their second asylum application was based on the first complainant's political activities which were not deemed credible during the first asylum proceedings. Furthermore, his account of his involvement in political activities was inconsistent with his statements during the first asylum proceedings. Thus, during the first proceedings, he maintained that he had founded a group to support political prisoners' families, whereas during the second asylum proceedings, he argued that he was a member of Ennahda. During the first asylum proceedings, the complainants contended that the police had searched their house and the shop only once, whereas during the second

asylum proceedings, the second complainant stressed that the police had visited their house on several occasions. Second, the Swiss authorities considered that the complainants' statements contradicted each other. Thus, the first complainant alleged that after questioning him at the Ministry of the Interior, the police had continuously paid visits to their house and taken him to the police station for questioning and that they had been harassed for some two months. At the same time, the second complainant contended that the first complainant had never been questioned or taken to the police station on those occasions, due to his poor health, and that the police harassed them from December 2006 to approximately one month prior to their departure. Third, the Swiss authorities argued that if the first complainant had indeed been wanted by the police, he would not have been allowed to obtain a passport and leave the country. Fourth, although the Swiss authorities admitted that Tunisian nationals returning from a prolonged stay abroad were routinely questioned upon arrival, such measures were not of such intensity as to be relevant in terms of asylum law. The Swiss authorities concluded that the evidence provided by the complainants did not suffice to establish the existence of a well-founded fear of persecution in Tunisia.

2.6 The complaints further submit that the Swiss asylum authorities stated that their expulsion from Switzerland was reasonable, lawful and possible. First, the complainants had failed to prove that they had been subjected to State persecution in Tunisia and there were no reasons to believe that they would be subjected to torture or other treatment contrary to the Convention, should they return to Tunisia. Second, even if the first complainant suffered from latent tuberculosis, depression and hepatitis C, as confirmed by medical certificates, those diseases could well be treated in Tunisia, which has an excellent and accessible health-care system.

2.7 The complainants submit that, contrary to the State party's contention, they would face real and imminent risk of being subjected to torture or other inhuman and degrading treatment in Tunisia. They submit that the Swiss authorities had not reviewed their case with due diligence, given that the decision of the Federal Administrative Court of 29 October 2010 mentioned a wrong date for their departure from the country and that the authorities ignored the new evidence presented, in particular the summons of 7 December 2006 with regard to both complainants and a summons of 23 January 2007 with regard to the first complainant. These documents corroborate the fact the Tunisian authorities have an important interest in controlling and possibly punishing the complainants, whom they suspect of being linked to Ennahda, and not merely because they have resided abroad for several years.

2.8 The complainants further submit that they clarified inconsistencies in their statements in their appeal. In particular, they explained that the first complainant had not informed his spouse of the questioning at the police station for "cultural reasons" and because he intended to spare her from further sorrow. Furthermore, they stressed that they had travelled to Switzerland on fake passports, which they had obtained by bribing officials. They refer to the report of the Department of State of the United States of America, according to which corruption is on the rise in Tunisia.<sup>1</sup> In addition, they did not leave Tunisia by air but crossed in a collective taxi into Libya. The complainants therefore contend that the fact that they were able to leave Tunisia does not mean that they are not wanted there.

2.9 The complainants argue that they would be arrested, if forcibly returned to Tunisia again. First, they were under police surveillance at the time of their departure and they had been warned not to leave the country. Second, the first complainant is indeed a supporter of Ennahda and attempted to establish contact with its representative in Switzerland,

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<sup>1</sup> Department of State, "2009 Country reports on human rights practices: Tunisia", 11 March 2010.

A.A.A.G. Third, the first complainant supported the families of political prisoners and thus was indirectly connected to the leader of Ennahda, L.S. Fourth, it cannot be assumed that the complainants would be released, if questioned at the airport upon return, given that they have fled Tunisia twice and were subjected to prolonged and thorough scrutiny upon return in 2006. Leaving the country illegally entails a prison sentence between 15 days and 6 months. The complainants contend that there is sufficient evidence to believe that the Tunisian authorities would arrest and possibly convict them of dissident activities.

2.10 The complainants further submit that conditions of detention in Tunisia are extremely harsh and that the judicial system is deficient, in particular in politically motivated cases, and refer to reports of non-governmental organizations in that sense.<sup>2</sup> In addition, the first complainant has serious health issues, as acknowledged by the Swiss authorities, and a prison sentence would put his life at risk and would subject him to inhuman and degrading treatment.

### **The complaint**

3. The complainants argue that their forcible return to Tunisia would constitute a breach by Switzerland of its obligations under article 3, paragraph 1, of the Convention.

### **State party's observations on the merits**

4.1 On 24 May 2011, the State party submitted its observations on the merits. It recalls the facts of the case and notes the complainants' argument before the Committee that they would be at risk of being subjected to torture or inhuman treatment, if returned to their country of origin. It notes that they do not present any new elements that would call into question the decisions of the asylum authorities of the State party; neither do they explain the inconsistencies in their allegations revealed by the said authorities.

4.2 The State party further clarifies the asylum proceedings pursued by the complainants. It notes, in particular, that on 10 June 2002, the Federal Office for Refugees rejected the complainants' application for asylum, submitted on 12 October 2000, considering that their allegations lacked credibility and that nothing in their case file led it to conclude that they would face treatment or punishment contrary to article 3 of the European Convention on Human Rights, which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, if forcibly returned to Tunisia. On 7 November 2002, the Federal Office for Refugees rejected the complainants' request for reconsideration. On 5 December 2005, the Swiss Asylum Appeal Commission rejected their subsequent appeal. On 18 January 2006, the complainants filed another request for reconsideration, arguing that the first complainant had had to be admitted to a psychiatric asylum for treatment. On 27 February 2006, the Federal Office for Migration decided not to examine their request on the merits. On 1 May 2006, the Swiss Asylum Appeal Commission refused their request on formal grounds as they had failed to pay the required fee. On 7 December 2006, the complainants were repatriated to Tunisia and medical assistance was provided to them during the journey.

4.3 The State party further submits that on 30 July 2007, the complainants filed another application for asylum at Zurich airport. The complainants argued, in particular, that upon

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<sup>2</sup> Freedom House, "Freedom in the World 2010: Tunisia", available from <http://www.freedomhouse.org/report/freedom-world/2010/tunisia> (3 December 2013); Amnesty International, "Tunisia – Amnesty International report 2010", available from <http://www.amnesty.org/en/region/tunisia/report-2010> (3 December 2013); Human Rights Watch "World Report 2010 – Tunisia", available from <http://www.hrw.org/world-report-2010/tunisia> (3 December 2013).

their return to Tunis, they had been summoned to the Ministry of the Interior on several occasions and that their dwellings had been searched. They provided copies of three summonses and a number of medical reports. On 8 September 2008, the Federal Office for Migration rejected their application for asylum. On 29 October 2010, the Federal Administrative Court dismissed their appeal on the grounds that their allegations lacked credibility and that the summonses provided did not suffice to conclude otherwise. The Court also pointed out that the health-related problems of the first complainant could well be treated in Tunisia.

4.4 The State party recalls that, under article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing a person to another State where there exist substantial grounds for believing that he or she would be subjected to torture. To determine the existence of such grounds, the competent authorities must 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. With reference to the Committee's general comment No. 1, the State party adds that the author should establish the existence of a "personal, present and real" risk of being subjected to torture upon return to the country of origin. The existence of such a risk must be assessed on grounds that go beyond mere theory or suspicion. Additional grounds must exist for the risk of torture to qualify as "real" (paragraphs 6 and 7 of general comment No. 1). The following elements must be taken into account to assess the existence of such a risk: evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the country of origin; allegations of torture or ill-treatment sustained by the author in the recent past and independent evidence thereof; political activity of the author within or outside the country of origin; evidence as to the credibility of the author; and factual inconsistencies in the claim of the author (paragraph 8 of general comment No. 1).

4.5 With regard to the existence of gross, flagrant or mass violations of human rights, the State party submits that this is not in itself a sufficient basis for concluding that an individual might be subjected to torture upon his or her return to his or her country. The Committee should establish whether the individual concerned would be "personally" at risk of being subjected to torture in the country to which he or she would return.<sup>3</sup> Additional grounds should be adduced for the risk of torture to qualify as "foreseeable, real and personal" under article 3, paragraph 1, of the Convention.<sup>4</sup> The risk of torture must be assessed on grounds that go beyond mere theory or suspicion.<sup>5</sup>

4.6 In light of the above, the State party submits that after President Ben Ali was overthrown in mid-January 2011, several interim Governments have attempted to put in place a democratic transition process in Tunisia. Transition authorities, with support from the international community, are in charge of elaborating a new constitution, restoring the rule of law and promoting human rights. According to the new Prime Minister, the main goal of the authorities is to maintain security in the country. Although rallies and protests remain frequent, there is no civil war or generalized violence in Tunisia nowadays. Repatriation to the country is therefore considered as reasonably required by the Swiss asylum authorities. The State party further reiterates that the country situation is not in itself a sufficient ground to conclude that the complainants might be subjected to torture in the event of removal. It argues that the complainants failed to show that they would face a foreseeable, real and personal risk of being subjected to torture, if returned.

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<sup>3</sup> See communication No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, para. 10.2.

<sup>4</sup> *Ibid.*, para. 10.5 and communication No. 100/1997, *J.U.A. v. Switzerland*, Views adopted on 10 November 1998, paras. 6.3 and 6.5.

<sup>5</sup> Para. 6 of general comment No. 1.

4.7 With regard to the allegations of torture or ill-treatment sustained in the recent past and the existence of independent evidence thereof, the State party underlines that the complainants have not claimed to have been subjected to torture or ill-treatment, either before the Swiss authorities or the Committee. During the first asylum proceedings, they maintained that their friends had been arrested because of their political activities and that the police had searched the second complainant's shop and the complainants' dwellings, for which reason they had decided to flee Tunisia. The competent authorities in Switzerland examined these allegations and considered that they lacked credibility. It was established, in particular, that there was nothing in the case file to conclude that the complainants would be subjected to treatment or punishment prohibited under article 3 of the European Convention on Human Rights. During the second asylum proceedings, the complainants maintained that upon their return in Tunisia in 2006, they had, on several occasions, been summoned to the Ministry of the Interior and questioned as to their residence in Switzerland and their Tunisian contacts there. The Swiss authorities stated that Tunisian nationals returning from a prolonged stay abroad were routinely questioned upon arrival. Furthermore, the complainants had been immediately released after questioning. The Swiss authorities also found that the copies of summonses provided by the complainants were not decisive. The State party points out that the first complainant stated that he had not been arrested but instead admitted to hospital on health grounds. Although the second complainant had been arrested, she had been released with no delay after questioning. Hence, the State party argues that the treatment sustained by the complainants, as claimed before the domestic authorities and the Committee, would not amount to a violation of the Convention.

4.8 With regard to the political activities pursued by the first complainant, the State party notes that both before the domestic authorities and the Committee, he contended that he had supported political prisoners in Tunisia and explained the consequences thereof. These allegations were duly examined by the Swiss asylum authorities, which dealt with the complainants' first asylum application and two requests for reconsideration. The domestic authorities established that the first complainant's allegations as to his political activities in Tunisia lacked credibility. Moreover, the complainants presented another version of such activities during the second asylum proceedings. The State party notes that these political activities are in any event insufficient to argue that there are substantial grounds to believe that the complainants would be persecuted by the Tunisian police or subjected to torture, if returned. It underlines that the complainants never alleged that they had been subjected to ill-treatment in relation to such activities, either before their first departure from Tunisia or between their repatriation to Tunis in December 2006 and their second departure therefrom in July 2007. It notes that, even assuming that the first complainant had indeed been politically active in 1998, his political activities would no longer be relevant in the current political context in Tunisia. The State party underlines that the first complainant does not pretend to have been politically involved in Switzerland.

4.9 With regard to the credibility of the complainants and the factual consistency of their claims, the State party submits that the domestic asylum authorities established that their allegations lacked credibility and that their accounts do not lead to the conclusion that there were substantial grounds to believe that they would be subjected to torture, if returned. In particular, the complainants' first application for asylum of 12 October 2000 was rejected as their allegations, especially concerning the first complainant's political activities, were considered implausible by the domestic authorities. Thus, at the registration centre, the first complainant stated that he had supported the families of political prisoners for 10 years before having founded, together with two other persons back in 1998, a group which had no connection with any other group. However, in his account to the cantonal authorities, he stated that he had financially supported the families of political prisoners only since 1998, when he had founded a group together with two other persons who belonged to the EI-

Daawa Wal-Tabligh group. Before that, he had not been interested in politics. The State party also points to inconsistencies in the first complainant's accounts regarding the places where he would hide when he knew that he was wanted by the authorities. Sometimes he submitted that he had slept in different places every night, sometimes he stated that he had stayed at the same place throughout the relevant period. He explained the inconsistencies by the fact that he had visited different persons in the daytime. The State party adds that during the first asylum proceedings, the first complainant stated that he had learnt from a neighbour that his two colleagues had been arrested and that the authorities had been looking for him. As these statements were not corroborated by any evidence, the Swiss authorities considered them implausible.

4.10 With reference to the findings of the domestic authorities, the State party further submits that if the first complainant had left Tunisia as described in his first application for asylum, it is implausible that he would have run the risk of passing, on two occasions, through customs in Tunis international airport with a passport bearing his name and of travelling by local airlines. It is also implausible that the complainants would have seen each other four to five times before leaving the country, in particular after the alleged searches. Similarly, it is implausible that the second complainant would have stayed at home until the very moment of departure.

4.11 The State party submits that during the first asylum proceedings, the first complainant declared he had applied for a visa to a Swiss representation in Tunisia after the search of 18 September 2000. However, it follows from his visa application that he had planned to visit Switzerland for professional reasons since August 2000. In addition, some professional references are dated 18 September 2000, when the search took place. Therefore, the domestic authorities concluded that the complainant had been at his workplace on the dates when he would have been apprehended. Furthermore, if the complainant had indeed feared being arrested by the police, he could have filed his application for asylum directly with the Swiss representation, which he had visited twice. The State party underlines that the complainant applied for asylum a week after his arrival in Switzerland.

4.12 The State party notes that the domestic authorities considered that the summons to the Ministry of the Interior provided during the first asylum proceedings, independently of the question of the authenticity of the document, did not testify to the fact that the first complainant had been summoned for the reasons alleged. Furthermore, he had not explained how he had obtained the summons, which had been issued a day prior to the interview at the Ministry. Hence, the domestic authorities found that the document was not pertinent.

4.13 The State party further submits that the complainants' accounts made during the first and the second asylum proceedings with regard to the political activities which had prompted their first departure from Tunisia diverged on essential points. As a consequence, the domestic authorities doubted the veracity of the grounds invoked by the complaints in support of their second application for asylum. For instance, during the first asylum proceedings, the first complainant asserted that he had founded, with two friends, a group to support the families of political prisoners; and that the group acted on its own and had no name. During the second asylum proceedings, the second complainant asserted that he had been a member of Ennahda for over two years before his first departure from Tunisia. Similarly, during the first asylum proceedings, the complainants claimed two visits by the police, one to their house and the other to the second complainant's shop. During the second asylum proceedings, the second author claimed that before their departure in October 2000, the authorities had paid a number of visits to their house and inquired about the first complainant.



4.14 The State party notes that the domestic authorities found that the complainants' accounts as to the problems with the Tunisian police were conflicting. Thus, the first complainant stated that, apart from the two summonses to the Ministry of the Interior, the police had visited the house regularly and taken him to the police station within a period of two months. On the other hand, the second complainant stated that the police had noted that her husband was ill, after interrogating him for the first time upon their repatriation to Tunis and had not bothered him since. She also stated that the police had frequently visited their house in order to check if the first complainant was there; they had not taken him anywhere. Such visits had started upon their return to Tunisia, in December 2006 and ended a month before their departure in September 2007. The first complainant argued that the conflicting statements were due to a misunderstanding. The second complainant subsequently stated that she could have been absent from the home when the police had taken her husband to the police station and that he had not told her of being interviewed by the police as he did not want to worry her. The domestic authorities were not convinced by these arguments.

4.15 The State party submits that, independently of the divergent accounts given by the complainants, the essential aspects of their statements go against all logic and general experience. Thus, if the first complainant had indeed been targeted by the Tunisian authorities, he would have never been able to obtain a passport and leave Tunisia, legally and with no difficulty, by land. The State party does not find it credible either that the complainant, if he feared arrest or harm, would have remained in Tunisia for about four months after obtaining, in April 2007, the passport which facilitated his departure from the country.

4.16 The State party further submits that, as established by the domestic authorities, the summonses provided by the complainants are not decisive. Their authenticity cannot be established. The complainants' explanation that the originals were taken away by the Tunisian authorities after the interviews is not compelling, to the extent that is contrary to usual practice. In light of the above, the State party endorses the grounds adduced by the Federal Office for Migration and the Federal Administrative Court regarding the lack of credibility of the first complainant's allegations. It notes that the complainant's claim that he would face the risk of torture if returned is not supported by evidence and lacks substantiation.

4.17 With regard to the first complainant's health condition, the State party notes that it is not a criterion to establish, within the meaning of article 1 of the Convention, whether there are substantial grounds to believe that he would face the risk of torture, if returned. Furthermore, in light of the Committee's jurisprudence, the aggravation of the condition of an individual's physical or mental health by virtue of deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16 of the Convention.<sup>6</sup> The State party notes that the first complainant submitted to the domestic authorities a number of medical reports to show that he was suffering from chronic hepatitis C, tuberculosis and depression. The domestic authorities established that on the one hand, his depression was linked to the rejection of his asylum applications and that on the other hand, his psychological problems could be treated in Tunisia. Hepatitis C, which can only be cured in 40 per cent of cases and which has a high prevalence in Tunisia, can also be treated there. The two medicines prescribed to the complainant, as well as their substitutes, are available on prescription in Tunisia. In addition, the complainants could count on their family network when they were repatriated in December 2006. Owing to

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<sup>6</sup> See, for instance, communication No. 227/2003, *A.A.C. v. Sweden*, Views adopted on 16 November 2006, para. 7.3.

their business activities in the past, they could certainly have built a social network in Tunisia which could be revived upon their return.

4.18 The State party submits that, in light of the foregoing, there are no substantial grounds to fear that the complainants would be concretely and personally exposed to torture if returned to Tunisia. Their allegations and evidence provided do not lead to the consideration that their return would expose them to a foreseeable, real and personal risk of torture. The State party, therefore, invites the Committee to find that the return of the complainants to Tunisia would not constitute a violation of the international obligations of Switzerland under article 3 of the Convention.

#### **The complainants' comments on the State party's observations**

5.1 On 11 June 2012, the complainants commented on the State party's observations. They disagree with the State party's arguments that, since the changes of January 2011, Tunisia has pursued a democratic transition and that there has recently been no civil war or generalized violence. They argue that despite the overthrow of President Ben Ali and the political changes in Tunisia, the human rights situation in the country remains unstable and its political future is very uncertain. Protests and strikes break out regularly. Opposition groups involved in toppling Ben Ali suspect that some members of the interim Government sympathize with the ousted administration and that the revolution was only possible due to support from the former regime, especially the security forces. The complainants further argue that many of the judges appointed by Ben Ali retained their positions after the overthrow and that the current Government use disproportionate and excessive force to quell the protests. They submit that uncertainty as to whether supporters of Ben Ali will regain power exposes them to a real risk of being tortured upon return. They add that the political changes do not mean that Tunisia is a safe country for former opponents of the regime.

5.2 The complainants further challenge the State party's argument that the summonses provided were not authentic and that interviewing returning long-term residents from abroad is commonplace. They submit that the original documents were kept by the authorities after the interviews. The State party's assertion that such a practice is unusual is unsubstantiated. Furthermore, the State party has failed to demonstrate that these documents are fake and this does not appear from the face of the documents. The complainants submit that they have discharged the burden of presenting an "arguable case", sufficient to require a response based on concrete evidence from the State party, rather than general assumptions or bare assertions.<sup>7</sup> They further argue that the State party has provided no evidence that interviewing returnees is commonplace, despite the summonses issued to the complainants after such interviews, which showed that the Tunisian authorities were highly interested in the complainants and intended to punish them. The State party has thus failed to make sufficient efforts to assess the risk for the complainants of being subjected to torture in case of forcible return. Furthermore, given that they fled the country after a warning not to do so and that they were interrogated thoroughly and at length after their repatriation in 2006, such a risk is real. The fall of the former President does not guarantee their safety as they have outstanding summonses in their name and the current Government reportedly resorts to excessive force.

5.3 With regard to the State party's argument concerning the lack of credibility of the complainants' accounts due to inconsistencies in their statements, the first complainant reiterates that he did not inform his spouse of having been taken to the police station in her absence for "cultural reasons" and because he wanted to ease her suffering. The

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<sup>7</sup> See para. 5 of general comment No. 1.

complainants also reiterate that they travelled on fake passports and had to bribe officials in order to flee. Furthermore, they did not leave the country by air but by land, which involved crossing the Libyan border illegally, in a taxi. The fact that they were able to leave Tunisia does not mean that they are not wanted by the authorities.

5.4 The first complainant adds that his health is very poor. He reiterates that he suffers from depression and chronic hepatitis C and used to suffer from tuberculosis and notes that this was acknowledged by the Swiss authorities. A prolonged prison sentence would certainly put his life at a serious risk. It must be assumed that he would face inhuman and degrading treatment in such a case. He further challenges the State party's argument that hepatitis C can be treated in Tunisia and notes that even if he is not imprisoned, there is a high risk that the required medical treatment would be unavailable or inaccessible there, given the current political uncertainty in the country.

5.5 The complainants argue that they have presented an "arguable case" and that the State party has failed to make sufficient efforts to assess whether there are substantial grounds for believing that they would be in danger of being subjected to torture, if returned. They submit that such grounds remain valid.

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

#### *Consideration of admissibility*

6.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 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.

6.2 The Committee recalls that, in accordance with article 22, paragraph 5(b), of the Convention, it shall 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 instant case the State party has recognized that the complainants have exhausted all available domestic remedies. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

#### *Consideration of the merits*

7.1 In accordance with article 22, paragraph 4, of the Convention, the Committee has considered the present communication in the light of all the information made available to it by the parties concerned.

7.2 The issue before the Committee is whether the removal of the complainants to Tunisia would violate the State party's obligation under article 3 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. The Committee must evaluate whether there are substantial grounds for believing that the complainants would be personally in danger of being subjected to torture upon their return to Tunisia. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 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 such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

7.3 The Committee recalls its general comment No. 1, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the

risk does not have to meet the test of being “highly probable” (para. 6), the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a “foreseeable, real and personal” risk.<sup>8</sup> The Committee further recalls that in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,<sup>9</sup> while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.4 The Committee notes that the State party has drawn its attention to perceived factual inconsistencies in the complainants’ accounts. The Committee also takes note of the comments presented by the complainants on the State party’s observations. It considers, however, that these inconsistencies do not constitute an obstacle for the Committee’s assessment of the risk of torture in case of their removal to Tunisia.

7.5 First, the Committee notes the first complainant’s argument that he would be at risk of persecution if returned to Tunisia, as he had financially assisted the families of political prisoners and supported Ennahda in Tunisia, prior to his arrival in Switzerland in 2000, where he attempted to establish contact with an Ennahda representative. In this context, the Committee observes that the political regime in Tunisia has changed since the complainants’ departure from the country. In particular, the former president, in power since 1987, resigned on 14 January 2011, whereas Ennahda holds a majority of seats in the Tunisian Constituent Assembly as a result of the parliamentary elections of October 2011. In addition, the Committee takes note of the low-level nature of the first complainant’s political activities in Tunisia but also in Switzerland, and of the existing inconsistencies in the complainants’ accounts regarding his repeated questioning at the police station and the frequency of police visits to their house in Tunisia. It observes in this regard that the complainants have failed to furnish sufficient evidence to support the claim that they were arrested and interrogated in connection with the first complainant’s political activities and not merely because they left Tunisia in 2000. As to the complainants’ allegation that they would be arrested and interrogated upon return, in the circumstances of the case, 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>10</sup>

7.6 The Committee further notes that the complainants have not claimed before the State party’s asylum authorities or the Committee that any charges, namely on account of the first complainant’s political activity, have been brought against them under Tunisian law. It also notes that apart from the summonses issued over 6 years and 10 months ago, the authenticity of which is disputed by the State party, they have submitted no other evidence suggesting that the Tunisian authorities have been looking for them since their departure and that they would face a foreseeable, real and personal risk of being tortured or subjected to inhuman and degrading treatment.<sup>11</sup>

8. In light of the above considerations, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or

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<sup>8</sup> See, inter alia, communications No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003; and No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005.

<sup>9</sup> See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

<sup>10</sup> Communication No. 57/1996, *P.Q.L. v. Canada*, Views adopted on 17 November 1997, para. 10.5.

<sup>11</sup> The Committee also notes that it has not been alleged by the complainants that members of Ennahda are subjected to treatment contrary to article 3 of the Convention.

Degrading Treatment or Punishment, concludes that the decision of the State party to expel the complainants to Tunisia would not constitute a violation of article 3 of the Convention.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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