



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

Distr.: General  
22 January 2019  
English  
Original: French

## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 811/2017\*, \*\*

<i>Communication submitted by:</i>	M.G. (represented by counsel, Boris Wijkström and Gabriella Tau)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	3 March 2017 (initial submission)
<i>Date of present decision:</i>	7 December 2018
<i>Subject matter:</i>	Deportation to Eritrea
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of torture or other cruel, inhuman or degrading treatment or punishment
<i>Articles of the Convention:</i>	3 and 16

1.1 The complainant is an Eritrean citizen born on 1 February 1989. He applied for asylum in Switzerland, but his application was rejected on 1 March 2016. He is facing deportation to Eritrea and considers that his return would constitute a violation by Switzerland of articles 3 and 16 of the Convention. He is represented by Boris Wijkström and Gabriella Tau of the Swiss Centre for the Defence of the Rights of Migrants.

1.2 On 8 March 2017, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from deporting the complainant to Eritrea while his complaint was being considered by the Committee. On 4 September 2017, the State party requested the lifting of the interim measures on the grounds that the complainant had not exhausted domestic remedies for lack of payment of the legal fees and that there was no indication that he would face a specific and personal risk of torture in the event of return to Eritrea. The Committee rejected the request on 13 August 2018.

#### The facts as presented by the complainant

2.1 The complainant is an Eritrean national of Bilen ethnicity. Given that he left school in year 9,<sup>1</sup> the Eritrean authorities arrested and detained him between 5 and 9 February

\* Adopted by the Committee at its sixty-fifth session (12 November–7 December 2018).

\*\* The following members of the Committee participated in the examination 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> To help his family financially by tending to the livestock and working in the fields.



2010 with a view to conscripting him into the army. He was detained in a metal freight container with about 70 to 80 other persons. He did not suffer any physical violence, but the conditions inside the container were appalling: it was extremely hot; there was not enough room to sleep; the inmates were given only bread to eat once a day; and they could go out only in the evening to relieve themselves. The complainant managed to escape with other prisoners one evening while they were outside to relieve themselves. The guards opened fire but, as there were many fugitives, they were unable to stop them.

2.2 The complainant returned to his home on 10 February 2010 and began living in hiding in the mountains. On 20 June 2010, after learning from his cousin that he was being summoned by the local authorities to be recruited by the army, he left Eritrea illegally for the Sudan on foot, where he stayed for three years and eight months, first in Kassala, then in the Shagarab refugee camp of the Office of the United Nations High Commissioner for Refugees (UNHCR). On 3 March 2014, the complainant left the Sudan and undertook a high-risk journey to Europe, crossing the desert into Libya and continuing by boat to Italy. He arrived in Switzerland on 22 May 2014 and applied for asylum the same day.

2.3 On 5 June 2014, the complainant had a first, summary hearing with the State Secretariat for Migration on his personal details. As the Swiss asylum system does not provide for free legal representation, the complainant, who is destitute, did not have the benefit of legal counsel. Nor was the complainant represented by counsel at his second hearing on 17 February 2016. Despite indications that his mother tongue was Bilen, the Secretariat conducted the hearing in Tigrinya.<sup>2</sup>

2.4 On 1 March 2016, the State Secretariat for Migration rejected his application for asylum on the grounds that the reasons he cited for leaving and the claim that he left Eritrea illegally were implausible. Citing the legal obligation for any asylum seeker to collaborate, in particular by giving one's name, with supporting documents and identity papers, the Secretariat noted that the complainant's identity had not been established, as he had not submitted any such documents.<sup>3</sup> The Secretariat also noted that, in the first hearing, the complainant had stated that he had been released from prison on 9 February 2010 whereas during his second hearing he had alleged that, on that date, he had escaped with other inmates. For the State Secretariat for Migration, a discrepancy of this kind in such a central part of his story discredited it. The Secretariat then noted inconsistencies in the complainant's story<sup>4</sup> and found that he had never been arrested or imprisoned by the Eritrean authorities, that his illegal departure was not credible and that the probability of his being required in the future to perform military service in Eritrea could not on its own justify granting refugee status given that such an obligation was imposed on every Eritrean citizen without discrimination.

2.5 Following the decision of the State Secretariat for Migration, the complainant appealed to the free legal advice office of Caritas in Fribourg. In an appeal to the Federal Administrative Court dated 4 April 2016, the complainant noted that, in the event of return to Eritrea, he would be at risk of being subjected to torture because of his refusal to serve in the army and his illegal departure from the country. Among other things, he asserted that his right to be heard had been violated since the hearings had been held in Tigrinya and not Bilen, his mother tongue. He also stated that the first instance authority had not properly assessed the risk of severe persecution he would face if he were to return, in particular by

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<sup>2</sup> In the minutes of the hearing, the Swiss authorities claimed that the complainant had declared during the first hearing that his command of Tigrinya was sufficient. The complainant denies this assertion, however, and points out that he had insisted that the second hearing be held in his language, Bilen.

<sup>3</sup> The State Secretariat for Migration noted that the complainant had simply stated that he had never possessed any documents while the case file did not show that he had taken any steps to obtain such documents.

<sup>4</sup> The State Secretariat for Migration considered that after eight years of schooling it was not credible that he did not know how to read Tigrinya; that it was illogical, to say the least, that the authorities, after his alleged escape from prison in February 2010, limited themselves to a mere summons several months later, without taking further action; that it defied all logic that the complainant should not be able to better describe his alleged illegal departure from the country, namely a journey on foot of some 200 km, from Keren to Kassala; and that it was unlikely that he would not have been stopped at any point by the authorities over such a long distance.

disregarding all relevant information on the human rights situation in Eritrea and his risk profile as a young man of age to perform military service who left his country without prior authorization.

2.6 In view of his lack of financial resources,<sup>5</sup> the complainant requested that his legal fees be waived. In an interim decision on 22 April 2016, the Federal Administrative Court rejected his request while specifying that, if an advance payment of 600 Swiss francs was not made, the appeal would be inadmissible. In reaching this conclusion, the Court made an early and summary assessment of the evidence to determine what the likely outcome of the proceedings might be and found that the conclusions reached in the appeal seemed bound to fail from the outset, as it contained no arguments or evidence likely *prima facie* to call into question the merits of the Secretariat decision. In particular, the Court held that the genuineness of a school certificate of 29 March 2016 and a baptism certificate of 25 March 2016 given as evidence in the appeal appeared questionable. According to information available to the Court, such documents could be easily forged. In this case, the dates of issue, i.e. shortly after the contested decision was received, on 1 March 2016, suggested that they had been produced for the purposes of the case.<sup>6</sup>

2.7 As to the complainant's arguments regarding the violation of the right to be heard in his mother tongue, the Federal Administrative Court observed that the complainant had stated that he had well understood the interpreter during earlier hearings and that he had attested to having understood the content of the minutes by signing all the pages of the said minutes. For the Court, these minutes seemed clear and complete and therefore sufficient to make an informed decision. The Court noted that the complainant had referred to many specific dates; on the other hand, his statements concerning his call-up for military service and his departure from Eritrea remained particularly evasive, stereotypical and lacking in detail. The Court then held that the fact that he could not obtain a visa from the Eritrean authorities did not in itself make it likely that the departure was illegal. Considering that the legal conditions for a waiver of payment of the legal fees were not met, the Court therefore rejected the application for full legal aid<sup>7</sup> and invited the complainant to pay 600 Swiss francs as a guarantee for the estimated legal fees; otherwise the appeal would be declared inadmissible. On 17 May 2016, for lack of payment, the Court declared the appeal inadmissible.

2.8 Following this negative decision, the complainant left Switzerland for Germany, where he applied for asylum. The German authorities requested that he be taken back by Switzerland under the Dublin II Regulation. The Swiss authorities agreed, and the complainant was transferred to Switzerland on 15 November 2016.

### **The complaint**

3.1 Given that he has evaded military service and fled after learning that he had been called up and that his departure from the country was illegal, the complainant would face serious harm, within the meaning of articles 3 and 16 of the Convention, in the event of his return to Eritrea.

<sup>5</sup> A social assistance certificate dated 9 March 2016 is included in the case file. The certificate indicates that the complainant has been entirely dependent on the social assistance he has been receiving since 10 June 2014 amounting to 415 Swiss francs. The complainant points out that his lodging and medical insurance are covered by the Swiss authorities, but that he himself must bear the cost of food, clothing, toiletries, transport etc.

<sup>6</sup> The complainant explains that, as the State Secretariat for Migration did not pose any questions about any identity papers other than the passport and identity card, he therefore filed copies of his parents' identity cards. It was only during the hearing with Caritas he had understood the extent of his duty to cooperate. He then contacted his family for it to transmit to him his school certificate (dated 29 March 2016) and baptism certificate (dated 25 March 2016).

<sup>7</sup> In order to conclude that the conditions for waiving payment of the legal fees had not been met, the Federal Administrative Court referred to article 65 al. 1 of the Federal Act on Administrative Procedure, which states: "Once the appeal is filed, a party who does not have sufficient resources and whose submissions do not appear to be bound to fail from the outset shall, at the party's request, be exempted by the appeal authority, its president or the investigating judge from paying the legal fees."

3.2 As a young man of age to perform military service and a rejected asylum seeker who fled his country illegally, the complainant would be automatically suspected of being an opponent of the regime and a deserter. He therefore has a risk profile that exposes him to punishment and persecution. He draws attention to the prevalence of gross and systematic human rights violations in Eritrea, in the light of which it is likely that he would face the risk of treatment contrary to article 3 of the Convention.

3.3 Furthermore, even if he were to survive the persecution suffered during his detention as a result of being returned, the complainant would no doubt be recruited by force by the army. In a recent case against Switzerland, the European Court of Human Rights granted interim measures that suspended the enforcement of the return to Eritrea,<sup>8</sup> which implicitly demonstrates that, in the current situation, an Eritrean person thus expelled is at risk of treatment contrary to articles 3 and 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

3.4 The complainant then challenges the proceedings before the Federal Administrative Court. His financial situation prevented him from settling the legal fees in advance, and the Court did not take into account the fact that he had not been represented by counsel during the hearings. In addition, the Court considered that his statements relating to his call-up for military service and his departure from Eritrea were “particularly evasive, stereotypical and lacking in detail” and thus implausible. The complainant claims that he has given consistent and clear answers to a total of about 187 questions. He cannot be faulted for failing to provide details, especially as more than six years have elapsed between the facts and the hearings.

3.5 The complainant also takes issue with the fact that he was required to express himself in a language that was not his own. He completed his education in Bilen in a Bilen-language school. His ability to express himself in Tigrinya was not sufficient to enable him to describe his entire journey in a detailed and spontaneous manner. The Court simply automatically indicated that the complainant had attested to having understood the content of the minutes of the hearing by signing them but did not make reference to the fact that the complainant had said he was not fluent in Tigrinya.

3.6 As regards the doubts of the Court concerning the evidential value of the documents provided to prove his identity, the complainant recalls that he stated that he had never taken any steps to obtain an identity card in order to avoid being recruited by the administration for military service or taken into custody for desertion. The Swiss authorities could have taken measures to verify the genuineness of the documents<sup>9</sup> rather than rule them out on the grounds that they could easily be forged. The complainant had explained in his appeal that he had requested his family to produce these documents in order to be able to prove his identity in Switzerland. The fact that they are rather recent in no way implies that they were forged.

3.7 With regard to the assertion of the State Secretariat for Migration that the complainant contradicted himself by stating once that he had been released and another time that he had escaped, the complainant recalls that the hearing was held in Tigrinya, a language that he has no command of. Therefore, it is possible that there had been a misunderstanding with the interpreter.

3.8 The complainant states that he described his journey, including the date of departure, duration and places travelled through before arriving in Kassala. The Secretariat asked merely two questions regarding the fact that he had not been stopped by the authorities during his flight. If the Secretariat considered that this point deserved further explanation, it should have asked additional questions. Furthermore, as public reports show,<sup>10</sup> the complainant does not have the profile of a person likely to obtain an exit visa from his

<sup>8</sup> The complainant refers to the case of *M.O. v. Switzerland*, No. 41282/16, 20 June 2017.

<sup>9</sup> For example, the Court could have requested the Swiss consulate in Asmara to analyse them.

<sup>10</sup> European Asylum Support Office (EASO), *EASO Country of Origin Information Report: Eritrea Country Focus* (May 2015, [https://coi.easo.europa.eu/administration/easo/PLib/EASO-Eritrea-CountryFocus\\_EN\\_May2015.pdf](https://coi.easo.europa.eu/administration/easo/PLib/EASO-Eritrea-CountryFocus_EN_May2015.pdf)), which points out, inter alia, that the fulfilment of national service (or the legal exemption from it) is a precondition for the issuance of exit visas (p. 52).

country. If he had obtained one, he would not have required the services of UNHCR for almost four years. His illegal departure from the country must therefore be considered as established. However, the Swiss authorities have refused to take account of the information on the matter. Although the Federal Administrative Court has mentioned that it is generally impossible for Eritreans to obtain exit visas, it concluded that the complainant had failed to make a convincing argument that his departure was illegal.

3.9 Consequently, the negative decision of the Secretariat entered into force without any serious analysis of the risk of a violation of the principle of non-refoulement by the State party. It was the responsibility of the Swiss authorities to remove any doubt about this risk by applying an “effective, independent and impartial review of the decision to expel”.<sup>11</sup> The “early and summary” analysis of the Court demonstrates that this was not done. In addition, the Court has not once mentioned the general human rights situation in Eritrea despite numerous references to sources of information contained in the appeal. Nor has it discussed the complainant’s contention that his profile as a young man of age to perform military service put him at risk.

3.10 In this regard, the complainant refers to the situation of human rights in Eritrea. The fact that he has shirked his obligation to perform military service and left the country without authorization makes him guilty of violating the 1995 Proclamation on National Service and renders him an opponent of the regime.<sup>12</sup> It is indisputable that, upon his arrival in Eritrea, he would be arrested, interrogated and punished for these acts.<sup>13</sup> In addition, he may be forced to perform military service for an indefinite period, subjecting him to forced labour, in violation of his fundamental rights. According to several human rights organizations, the human rights situation in Eritrea remains dire and is exacerbated by indefinite compulsory military service.<sup>14</sup> The Eritrean authorities use lethal force against any person attempting to resist them, flee the army or leave the country clandestinely.<sup>15</sup> Torture is commonly used during arrests or detentions, including against deserters.

3.11 The former President of the Swiss Confederation said in 2015 that “it [was] inconceivable that Switzerland should send persons back to an arbitrary State.”<sup>16</sup> The Human Rights Council Commission of Inquiry on Human Rights in Eritrea and UNHCR reported on the situation in the country and the treatment of returned asylum seekers.<sup>17</sup> The Human Rights Committee also found a violation of article 7 of the International Covenant on Civil and Political Rights in the light of the failure of the State concerned to take due account of the fact that, because of his inability to prove that he had left Eritrea legally, the author of the complaint was at risk of being designated as a failed asylum seeker and a

<sup>11</sup> *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.7.

<sup>12</sup> Eritrea, Proclamation on National Service, No. 82/1995, 23 October 1995; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea ([www.refworld.org/docid/4d4afe0ec2.html](http://www.refworld.org/docid/4d4afe0ec2.html)), 20 April 2011, p. 11; T.R. Müller, “Bare life and the developmental state: Implications of the militarisation of higher education in Eritrea”, *The Journal of Modern African Studies* 46, No. 1, March 2008, p. 115; and Human Rights Watch, *Service for Life: State Repression and Indefinite Conscriptioin in Eritrea*, 16 April 2009, p. 27.

<sup>13</sup> Human Rights Watch, *Service for Life: State Repression and Indefinite Conscriptioin in Eritrea*, 16 April 2009, pp. 27–29, 68, 70, 72 and 74; Amnesty International, *Eritrea: 20 years of independence, but still no freedom*, 9 May 2013, pp. 30–31; G. Kibreab, “The open-ended Eritrea National Service: the driver of forced migration”, Paper for the European Asylum Support Office Practical Cooperation Meeting on Eritrea, 15 and 16 October 2014, pp. 12–14; UNHCR Eligibility Guidelines, p. 11; and A/HRC/26/45, paras. 44 and 45.

<sup>14</sup> Human Rights Watch, *World Report 2015* ([www.hrw.org/sites/default/files/world\\_report\\_download/wr2015\\_web.pdf](http://www.hrw.org/sites/default/files/world_report_download/wr2015_web.pdf)), pp. 218 ff.; Amnesty International, *Annual Report 2014/15: The State of the World’s Human Rights* ([www.amnesty.org/download/Documents/POL1000012015ENGLISH.PDF](http://www.amnesty.org/download/Documents/POL1000012015ENGLISH.PDF)), pp. 172 ff.; and Swiss Refugee Council, *Analyse pays — Érythrée, mise à jour février 2010* ([www.osar.ch/assets/herkunftslaender/afrika/eritrea/erythree-mise-a-jour-fevrier-2010.pdf](http://www.osar.ch/assets/herkunftslaender/afrika/eritrea/erythree-mise-a-jour-fevrier-2010.pdf)).

<sup>15</sup> United States Department of State, *Eritrea 2013 Human Rights Report* ([www.state.gov/documents/organization/220321.pdf](http://www.state.gov/documents/organization/220321.pdf)), 27 February 2014, section 1a.

<sup>16</sup> “Simonetta Sommaruga refuse tout refoulement de réfugiés érythréens”, *Le Temps*, 6 August 2015 ([www.letemps.ch/suisse/simonetta-sommaruga-refuse-refoulement-refugies-erythreens](http://www.letemps.ch/suisse/simonetta-sommaruga-refuse-refoulement-refugies-erythreens)).

<sup>17</sup> A/HRC/29/CRP.1A/HRC/32/CRP.1; and UNHCR Eligibility Guidelines, pp. 14, 33 and 34.

person who had not completed his military service requirement in Eritrea and thus ran a real risk of being subjected to treatment contrary to the requirements of article 7.<sup>18</sup>

3.12 Lastly, the complainant refers political activities undertaken in exile against the current Eritrean Government.<sup>19</sup>

### State party's observations on admissibility and the merits

4.1 On 4 September 2017, the State party submitted observations on admissibility and the merits of the complaint. On admissibility, the State party argues that the complainant has not exhausted all the domestic remedies available to him. Citing the Committee's practice, the State party notes that the case file does not suggest either that the advance payment of fees requested prevented the complainant from exhausting this remedy or that the remedy would have been futile.<sup>20</sup>

4.2 On the merits, the State party recalls the elements that must be taken into account to ascertain the existence of a personal, present and serious danger of being subjected to torture upon return to the country of origin: evidence of a consistent pattern of gross, flagrant or mass human rights violations in the country of origin; any claims of torture or ill-treatment in the recent past and independent evidence to support those claims; the political activity of the author within or outside the country of origin; any evidence as to the credibility of the author; and any factual inconsistencies in the author's claims.<sup>21</sup>

4.3 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. The Committee must establish whether the complainant is "personally" at risk of being subjected to torture in the country to which he would be returned.<sup>22</sup> 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.<sup>23</sup> The risk of torture must be assessed on grounds that go beyond mere theory or suspicion.<sup>24</sup>

4.4 The State party then describes the Swiss authorities' practice of processing asylum applications from Eritrean nationals. The State Secretariat for Migration constantly evaluates reports on Eritrea and exchanges information with experts and authorities from partner countries. On that basis, it gives an updated appraisal of the situation, which serves as a basis for Swiss asylum practice. In May 2015, the Secretariat prepared a report entitled "Erythrée — Étude de pays" (Eritrea: Country study), which brings together all this information. This report was reviewed by four partner asylum and migration authorities, an external expert and the European Asylum Support Office (EASO).<sup>25</sup> In February and March 2016, the Secretariat conducted a mission to review, further develop and complement this information by including other sources that have become available in the meantime. On the

<sup>18</sup> *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.3.

<sup>19</sup> He attaches a letter from the Eritrean People's Democratic Party dated 18 March 2016 attesting that the complainant is a member of the Swiss branch of the party and has been involved in activities such as organizing meetings, disseminating information, mobilizing young people for democratic change and other activities. The letter states that, as a member of this main opposition party, the complainant will not be safe in the event of his return since he would face imprisonment and torture and even the risk of loss of life.

<sup>20</sup> See inter alia, *A.E. v. Switzerland* (CAT/C/14/D/24/1995), para. 3, and *L.O. v. Canada* (CAT/C/24/D/95/1997), para. 6.5.

<sup>21</sup> Committee's general comment No. 1 (1997) on the implementation of article 3 in the context of article 22 of the Convention, para. 8.

<sup>22</sup> *K.N. v. Switzerland* (CAT/C/20/D/94/1997), para. 10.2.

<sup>23</sup> *Ibid.*, para. 10.5, and *J.U.A. v. Switzerland* (CAT/C/21/D/100/1997), paras. 6.3 and 6.5.

<sup>24</sup> General comment No. 1, para. 6.

<sup>25</sup> [www.easo.europa.eu/sites/default/files/public/Eritrea-Report-Final.pdf](http://www.easo.europa.eu/sites/default/files/public/Eritrea-Report-Final.pdf). The report, published by EASO, was reviewed by the national asylum and migration departments of Austria, Belgium, Denmark and Germany, and by Dan Connell, an external expert who has been working on Eritrea for over 25 years as a journalist, lecturer and researcher.

basis of all this information, the Secretariat published an update on 22 June 2016.<sup>26</sup> In reports published between December 2015 and August 2016, several national authorities – such as those of Sweden<sup>27</sup> and Norway<sup>28</sup> and the Home Office of the United Kingdom of Great Britain and Northern Ireland<sup>29</sup> – reached similar conclusions.

4.5 In June 2016, the Swiss asylum authorities modified their practice regarding illegal departures from Eritrea, which was confirmed in particular by two landmark decisions of the Federal Administrative Court of January<sup>30</sup> and August 2017.<sup>31</sup> In its decision of August 2017, the Court examined in great detail the situation in Eritrea.<sup>32</sup> This examination shows that illegal exit from Eritrea is no longer sufficient, in itself, to justify recognition as a refugee. Likewise, the Eritrean authorities no longer seem to take a punitive approach to nationals who return to the country.<sup>33</sup> A major risk of punishment exists only if there are additional factors that make the asylum seeker undesirable in the eyes of the Eritrean authorities.<sup>34</sup> The treatment of unsuccessful applicants depends on the way in which they return to the country, i.e. whether the return is voluntary or forcible. The voluntary return of rejected Eritreans ensures that they enjoy a privileged status as a member of the “diaspora”.<sup>35</sup> These persons are in fact “rehabilitated” and exempted from national service for at least three years; they do not thus risk State persecution in connection with their departure from the country.

4.6 Nevertheless, the State party concedes that information on forcible returns carried out in recent years is sparse, as the Eritrean Government categorically rejects forcible returns from Europe and only forcible returns by land from Sudan have been carried out. There is little or no available information on the profile and past history of the returnees. In the case of *M.O. v. Switzerland*, the European Court of Human Rights held that the general human rights situation in Eritrea in itself did not prevent the interested party’s return.<sup>36</sup> The Court also held that a person whose asylum application is rejected on the basis of a lack of credibility could not be considered to have left Eritrea illegally and that being a rejected asylum seeker was not in itself sufficient to consider that he or she faced a real risk of treatment contrary to article 3 of the European Convention on Human Rights.<sup>37</sup> In its August 2017 decision, the Federal Administrative Court also examined the general situation in Eritrea and concluded that the country was not experiencing any war or civil war or situation of widespread violence.

4.7 The complainant cites the risk of being conscripted into the army. However, the possibility of being called up to perform national military service upon return to Eritrea does not constitute grounds for granting refugee status. Military service does not in itself constitute certain persecution where asylum is concerned any more than it does a risk of treatment contrary to article 3 of the Convention for this reason or, for that matter, on any other grounds. However, the complainant was unable to make his illegal departure from Eritrea plausible. He has thus failed to make a convincing argument that he would face treatment prohibited under article 3 upon return.

<sup>26</sup> The report points out that persons who wish to voluntarily return must pay a diaspora tax (2 per cent) to an Eritrean diplomatic mission and those who have not completed their national service must sign a confession of guilt.

<sup>27</sup> Lifos, *Landrapport Eritrea*, 15 December 2015, (<https://lifos.migrationsverket.se/dokument?documentSummaryId=36406>), paras. 5.4, 7.1.2 and 8.1.1.

<sup>28</sup> Landinfo, *Eritrea: National Service*, 20 May 2016 (<https://landinfo.no/wp-content/uploads/2018/03/Eritrea-national-service.pdf>), para. 3.2, and *Eritrea: Reactions towards returned asylum seekers*, 27 April 2016 (<https://landinfo.no/wp-content/uploads/2018/03/Eritrea-Reactions-towards-returned-asylum-seekers.pdf>).

<sup>29</sup> [www.gov.uk/government/publications/eritrea-country-information-and-guidance-iagci-review](http://www.gov.uk/government/publications/eritrea-country-information-and-guidance-iagci-review).

<sup>30</sup> Federal Administrative Court, decision D-7898/2015 of 30 January 2017.

<sup>31</sup> *Ibid.*, decision D-2311/2016 of 17 August 2017.

<sup>32</sup> *Ibid.*, pp. 14–16.

<sup>33</sup> *Ibid.*, recital 6.3, p. 10.

<sup>34</sup> *Ibid.*, decision D-7898/2015, recital 5.2, p. 42.

<sup>35</sup> *Ibid.*, recital 3.9, p. 9.

<sup>36</sup> *M.O. v. Switzerland*, para. 70.

<sup>37</sup> *Ibid.*, para. 79.

4.8 The complainant uses country-specific information in a very selective way. He largely relies on the reports of Human Rights Watch and Amnesty International, which are based solely on statements by people who have left Eritrea. Moreover, these reports do not contain any information on the treatment of persons accused only of leaving the country illegally.

4.9 With regard to the allegations of torture or ill-treatment suffered in the recent past, the complainant does not claim to have been subjected to acts of torture or ill-treatment in his country. He expressly stated that he had not suffered any physical violence during his detention from 5 to 9 February 2010 but that the conditions inside the container had been appalling. At his hearing on 17 February 2016, he said that the food was bad, that it was extremely hot in the container, that there were several of them in a small space and that they did not have enough room to sleep. The Swiss authorities considered that these statements were not plausible and concluded that the complainant had never been arrested or imprisoned by the Eritrean authorities.

4.10 The State party emphasizes that the complainant's hearing was conducted in Tigrinya with his consent. The official responsible for the hearing was at pains to stress that the complainant indicate when he did not understand a question. As noted by the State Secretariat for Migration and the Federal Administrative Court, the complainant stated during both hearings that he understood the interpreter well and confirmed at the end of the hearings that the minutes were in keeping with his statements. There is no mention of any problems of understanding on his part. In addition, the complainant expressly stated that he had never had any problems in his country of origin.

4.11 Furthermore, the complainant did not claim that he was engaged in political activities in his country of origin. Although he produced a letter attesting to his membership of the Swiss branch of Eritrean People's Democratic Party in his appeal to the Court, he did not mention such activities in his complaint to the Committee.

4.12 With regard to the credibility of the complainant and the consistency of the reported facts, the authorities established that his account was not plausible. First, the Secretariat for Migration noted that his statements about how he left prison, which was a central part of his story, were contradictory. The Secretariat also noted that, regardless of the version held to, the complainant's description of the conduct of the Eritrean authorities following his five-day detention did not appear convincing. The Secretariat and the Federal Administrative Court also noted that the complainant's statements proved to be particularly brief, evasive, stereotypical and not very spontaneous, in particular with regard to his departure from Eritrea,<sup>38</sup> his call-up for national service, the content of the call-up papers<sup>39</sup> and the conduct that followed. They considered this lack of elaboration all the more surprising since the complainant also cited very precise dates, as if he had learned them by heart in order to apply for asylum.

4.13 The complainant largely attributes these inconsistencies to the fact that the hearings were conducted in Tigrinya, a language he says he has an insufficient command of. Although the complainant did in fact mention at the beginning of the first, summary hearing on his personal details and subsequent hearing on the grounds for asylum that he would have liked to have been assisted by an interpreter with a command of Bilen, he nevertheless stated having fully understood the interpreter hired for the first hearing before confirming that he stood by his position and signing the minutes in question. During his hearing on the grounds for asylum, he said he understood the translation very well. He confirmed that the minutes were in keeping with his statements and that they had been read back to him in a language he understood without his indicating any particular difficulties. Nowhere in these minutes does it appear that problems of comprehension, translation or expression were raised by the complainant. The certificate from the representative of the support service

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<sup>38</sup> The State Secretariat for Migration considered that it defied all logic that the complainant was not able to better describe his alleged illegal departure from the country, i.e. a journey on foot of some 200 km from Keren to Kassala, and that it was unlikely that he would not have been stopped at any point by the authorities over such a long distance.

<sup>39</sup> At the first hearing, the complainant added that he could not produce the call-up papers, whereas, at the second hearing, he said he had contacted his family about them.



annexed to the minutes of 17 February 2016 did not mention any difficulties of understanding during the complainant's hearing. In addition, the content of the minutes appeared to be both clear and comprehensive and therefore sufficient to make an informed decision. Consequently, the investigating judge declared this complaint to be unfounded a priori, noting that the lower authority had correctly held that Tigrinya was another suitable language for the hearing. The communication before the Committee does not contain any new arguments that would call into question this analysis.

4.14 In addition, the complainant did not present any evidence during the proceedings that he had been in so much danger in his country as to have to go into exile. The State Secretariat for Migration also found the failure of the complainant to present any identity document or piece of evidence during the two years that the ordinary proceedings had lasted was such that his statements remained questionable from the outset.<sup>40</sup> Before the Secretariat, as before the Committee, he simply stated that he had never possessed any documents and it does not appear from the Secretariat files that he had taken any concrete steps towards submitting any original birth certificate, school diploma or baptism certificate, for example. The argument that the complainant, born on 1 February 1989, was a minor when he left Eritrea and was thus without an identity document is clearly false since, according to his own account, he left the country in 2010, at the age of 21.

4.15 In view of the implausibility of the complainant's statements, the State Secretariat for Migration concluded that it could legitimately consider that the complainant had never been arrested or imprisoned by the Eritrean authorities, that he had never been involved in any judicial proceedings and that he had not engaged in any political or religious activities likely to cause him harm. In addition, the Secretariat considered that his illegal departure was not credible. Lastly, the likelihood that the complainant will be required to fulfil military obligations in Eritrea in the future cannot in itself be relevant within the meaning of the Convention.

4.16 Even if it were assumed that the complainant had left his country of origin under the alleged circumstances, according to recent Federal Administrative Court case law amending past practice and confirmed by the European Court of Human Rights, an illegal departure from Eritrea is no longer sufficient, in itself, to justify the recognition of refugee status. In the case against Switzerland cited by the complainant,<sup>41</sup> the author had put forward arguments similar to those of the complainant in the present complaint. The Court held that, since it was impossible to confirm an illegal exit from Eritrea, particular attention should be paid to the plausibility of the testimony of the person concerned.<sup>42</sup>

4.17 Lastly, with regard to the complainant's assertion that he was not represented by legal counsel at his hearings, in order to defend his choice of language and explain the importance of his signature on the minutes, the complainant was informed at the start of the hearings of the options for assistance available to him and of his responsibility as to the truth of his statements, on which the authorities would base their decision. In terms of the invitation to the hearing on the grounds for asylum, the applicant was also advised that he would be entitled to be assisted, at his own expense, by a representative of his choice.

4.18 In conclusion, there is nothing to indicate the existence of substantial grounds for fearing that the complainant would face a specific and personal risk of being tortured on his return to Eritrea. His allegations and the evidence provided do not warrant a finding that his return would expose him to a real, concrete and personal risk of being tortured.

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

5.1 On 22 December 2017, the complainant submitted his comments on the State party's observations.

<sup>40</sup> The State party refers to the Federal Administrative Court's assessment of the genuineness of a school certificate dated 29 March 2016 and a baptismal certificate dated 25 March 2016, see para. 2.6.

<sup>41</sup> *M.O. v. Switzerland*.

<sup>42</sup> *Ibid.*, para. 77.

5.2 With regard to admissibility, it is clear from the file that the complainant is destitute,<sup>43</sup> which is not refuted by the State party. He had therefore requested a waiver of advance fees. Consequently, he cannot be required to pay the amount requested, nor can meeting the requirement to exhaust all domestic remedies be made dependent on such payment. It is precisely because of the requirement of an advance payment of fees that the complainant did not benefit from a thorough and diligent examination of his file by an independent judicial body. Since he challenged the decision of the State Secretariat for Migration by filing an appeal with the Federal Administrative Court, the State party's argument that the complainant had not exhausted domestic remedies is not relevant.

5.3 On the merits, the complainant challenges the change in position of the Secretariat since June 2016 when it considers that the illegal departure from Eritrea no longer constitutes a risk of persecution on its own. He refers to the case law of the European Court of Human Rights on the quality standards to be respected by State authorities in the processing of information on the countries of origin of asylum seekers and to the different (minimum) standards contained in European directives,<sup>44</sup> in European Union guidelines (also mentioned in the case law of the Federal Administrative Court)<sup>45</sup> and in the general principles applicable to administrative procedures. These sources confirm the binding nature of quality standards in the processing of country of origin information.<sup>46</sup>

5.4 Referring to the case law of the European Court of Human Rights on the use of country of origin information standards,<sup>47</sup> the complainant points out that this decision was adopted on the basis of a mission carried out between February and March 2016, on which the State Secretariat for Migration gives more weight to the information from the Eritrean authorities and international diplomatic sources than non-governmental and international organizations. The information coming from the Eritrean regime and international diplomatic sources is also vague. The sources on which this change in practice is based are therefore extremely poor. In addition, they are often quoted out of context. In view of the above, the basis used by the Secretariat as a source of information to justify its decision to change its practice cannot be considered sufficient.

5.5 Even if this new practice was confirmed by the Federal Administrative Court, the Court's assessment is misguided, since it is based on unclear and insufficient information from which unfounded conclusions are drawn. First of all, the question of what risk the complainant faces in the event of voluntary return does not arise, as he is opposed to returning to his country of origin because there is a risk, in the light of his age, of being conscripted into the Eritrean army. The complainant categorically refuses to submit to the obligation to perform military service because he considers that it would constitute forced labour.<sup>48</sup>

<sup>43</sup> He includes a certificate in the case file relating to his social assistance situation, issued by ORS on 1 October 2018, which points out: between 10 June 2014 and 19 September 2014, social assistance amounted to 12 francs per day, or 360 francs per month; between 20 September 2014 and 30 April 2016, after being provided with shared accommodation, social assistance amounted to 415 francs per month; and as from 1 May 2016, following a negative asylum decision, the complainant received emergency assistance amounting to 10 francs per day, or 300 francs per month.

<sup>44</sup> The complainant invokes in particular paragraph 39 and article 45 (2) (b) of directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection and article 4 (3) (a) of directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

<sup>45</sup> European Union, *Gemeinsame EU-Leitlinien für die Bearbeitung von Informationen über Herkunftsländer (IOC)*, April 2008 ([www.ecoi.net/blog/wp-content/uploads/2012/07/coi\\_leitlinien-2008-04-de.pdf](http://www.ecoi.net/blog/wp-content/uploads/2012/07/coi_leitlinien-2008-04-de.pdf)).

<sup>46</sup> R. Mattern, "COI-Standards: Die Verwendung von Herkunftsländerinformationen (COI) in Entscheiden der Asylinstanzen", *Asyl* 3/10, pp. 3–12.

<sup>47</sup> *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008, paras. 119–121, and *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 232–234.

<sup>48</sup> According to UNHCR, the absence of the possibility of refusal to serve on grounds of conscience is the basis for the need for international protection when the person concerned would be exposed to inhuman conditions while performing military service; see UNHCR Guidelines on International Protection No. 10, para. 31.

5.6 The complainant is also opposed to the obligation to sign a “letter of regret” and to pay a 2 per cent tax<sup>49</sup> in order to benefit from the privileged status to be considered a member of the diaspora. He considers that if he signed the letter of repentance, he would implicitly acknowledge that he had committed an offence by leaving Eritrea and would accept any penalties that might be imposed on him for that reason.<sup>50</sup> The European Asylum Support Office (EASO) report of May 2015 on Eritrea states that the above-mentioned letter and 2 per cent tax provides no guarantee against punishment and that signing the letter of repentance implies directly confessing to an offence and declaring a willingness to accept the relevant punishment.<sup>51</sup>

5.7 In addition, the Federal Administrative Court does not present a final conclusion on the return of Eritreans who fled their country and were forcibly repatriated but only raises the issue and considers that, in any case, Eritrean nationals can return freely to their country. However, there is not enough reliable information to conclude that the Eritrean authorities would no longer punish forcibly returned Eritreans as severely as before. On the contrary, various sources show that illegal departure is still considered a crime against the nation and is unduly punished by the Eritrean regime.<sup>52</sup> In the case of *M.O. v. Switzerland*, the European Court of Human Rights also held that, in the presence of an asylum application filed by an Eritrean national close to the age or of age for performing military service who has offered a plausible explanation for his illegal exit from the country, the authority is required to remove any doubt as to the risk of ill-treatment.<sup>53</sup>

5.8 The complainant then challenges the State party’s claim that living conditions in Eritrea have improved, arguing that the positive developments referred to by the Federal Administrative Court were based only on information coming from the Eritrean regime. The Court also acknowledged that the economic situation remained difficult and recalled that it is a single-party regime, that there is no separation of powers, that the surveillance of citizens was very complex and well developed and that detentions were arbitrary and could target anyone.<sup>54</sup>

5.9 With regard to the State party’s assertion that forced recruitment into the Eritrean national service does not constitute a risk of treatment contrary to article 3 of the Convention, the complainant emphasizes that the State party does not explain which sources of information it bases this conclusion on. The State party only refers to the Federal Administrative Court judgment of 31 January 2017, which also does not support why this practice does not constitute a form of ill-treatment. In fact, the Court has not yet made an explicit statement on this subject. This point is particularly important, since the complainant’s request for protection is based on the fact that he refuses to serve in the Eritrean national service. In the present case, in addition to the draconian punishment for evading military obligations, the complainant risks being forcibly enlisted in the Eritrean army in the event of his return, which is not disputed by the State party. Being subjected to

<sup>49</sup> See footnote 26 above. The levying of this tax was strongly condemned by the Security Council in paragraph 10 of its resolution 2023 (2011).

<sup>50</sup> Under the Eritrean Proclamation on National Service, any insubordination in time of war is punishable by imprisonment for up to 5 years. Furthermore, the Swiss authorities recognize that sanctions are imposed arbitrarily and extrajudicially in Eritrea.

<sup>51</sup> EASO report May 2015, p. 43. See also Upper Tribunal of the United Kingdom, *MST and others (national service — risk categories)* (CG) [2016] UKUT 443 (IAC), para. 334, in which the Tribunal held that there was no evidence to suggest that the letter of repentance and the payment of the tax would enable draft evaders and deserters to reconcile with the Eritrean authorities.

<sup>52</sup> “L’ONU critique le durcissement de la Suisse envers les Érythréens”, *Le Temps*, 17 February 2017 ([www.letemps.ch/suisse/lonu-critique-durcissement-suisse-envers-erythreens](http://www.letemps.ch/suisse/lonu-critique-durcissement-suisse-envers-erythreens)).

<sup>53</sup> *M.O. v. Switzerland*, para. 79.

<sup>54</sup> Amnesty Switzerland took a position following the Federal Administrative Court ruling on the possible return of rejected Eritrean asylum seekers, indicating that those who have left the country illegally risk imprisonment or other penalties: “Érythrée: la sécurité des personnes renvoyées n’est pas garantie” (Eritrea: The safety of returned persons is not guaranteed), Amnesty Switzerland, press release issued on 31 August 2017 ([www.amnesty.ch/fr/pays/europe-asie-centrale/suisse/docs/2017/erythree-la-securite-des-personnes-renvoyees-pas-garantie](http://www.amnesty.ch/fr/pays/europe-asie-centrale/suisse/docs/2017/erythree-la-securite-des-personnes-renvoyees-pas-garantie)).

a national service such as that which exists in Eritrea constitutes forced labour<sup>55</sup> and can be described as a form of slavery.<sup>56</sup>

5.10 The State party alleges that the complainant used selective information that did not include any details of the treatment of persons accused only of illegal exit from the country. The complainant takes issue with this assessment on the basis of the decisions in *MST and others* of the British Upper Tribunal and *M.O. v. Switzerland* of the European Court of Human Rights, which hold that an Eritrean person risks serious punishment in the event of illegal departure from the country and if he is of age to perform his military service.<sup>57</sup> Furthermore, the State party has not commented in any way on the complainant's argument that, as a young man of age to perform his military service, he has a risk profile. Thus, the State party failed in its duty to give reasons for its judgment and violated the complainant's right to be heard.

5.11 The complainant also reiterates that he did not have a representative during the hearings. No one was therefore able to defend his choice of language and explain to him the importance of his signature on the minutes, i.e. that it could be used against him. Therefore, it would be wrong to assume that the asylum hearing was conducted in Tigrinya with the author's agreement.

5.12 The complainant also notes that, contrary to the State party's assessment, he attested to his membership of the opposition party in exile, the Eritrean People's Democratic Party, and indicates that he has regularly participated in demonstrations in Switzerland against the Eritrean regime.<sup>58</sup>

5.13 With regard to the State party's refusal to admit the complainant's explanation of his alleged contradiction over the way he was released from prison, the complainant explains that this contradiction is the result of his lack of command of the language in which the hearing was conducted. In fact, it is very likely that he used the word "released" incorrectly. Therefore, it is possible that there had been a misunderstanding with the interpreter. This contradictory fact therefore clearly cannot be given much weight. Moreover, the complainant was not confronted with this "contradiction" and consequently did not have the opportunity to clarify it at his second hearing.

5.14 The complainant also points out that he was summoned by the local authorities to be recruited for the army. It is not surprising that the military authorities did not travel to the complainant's village. The report cited by the State Secretariat for Migration<sup>59</sup> emphasizes in this regard that the Eritrean military authorities have neither the capacity nor the logistics to carry out systematic searches, including for persons who evade national service.

5.15 With regard to the brevity of his responses at the hearings and the Swiss authorities' allegations that they were evasive, stereotypical and not very spontaneous, and that he had cited specific dates as if the account had been duly prepared for the submission of the asylum application, the complainant reiterates that the hearings were conducted in a language with which he did not feel at ease. It seems obvious that it is easier to indicate dates than to make detailed and precise descriptions in a language that is not his mother tongue. The brevity of his answers cannot therefore be held against him. The complainant

<sup>55</sup> The United Nations Commission of Inquiry noted that, in Eritrea, a large part of the population was subjected to forced labour (<https://news.un.org/fr/story/2015/06/312512-un-nouveau-rapport-de-lonudenonce-les-violations-flagrantes-des-droits-de#.VliFd9IvcdV>) and several human rights organizations have drawn attention to the fact that the duration of compulsory military service was indefinite: Human Rights Watch, *World Report 2015*, pp. 218 ff.; Amnesty International, *Report 2014/15*, pp. 145 ff.; and Swiss Refugee Council, *Analyse pays — Érythrée, mise à jour février 2010*.

<sup>56</sup> The complainant invokes the International Labour Organization (ILO) Forced or Compulsory Labour Convention, 1930 (No. 29), and the case law of the European Court of Human Rights on forced labour.

<sup>57</sup> *M.O. v. Switzerland*, para. 79.

<sup>58</sup> He included in the file two photos taken at a demonstration held on 11 August 2017 in Bern, where the complainant was in charge of security, and a photo of another demonstration held on 10 November 2017 on the Place des Nations. Both events had been organized by the Eritrean People's Democratic Party.

<sup>59</sup> "Focus Eritrea: Update Nationaldienst und illegale Ausreise", p. 18.

does not see how any preparation before the hearing should be counted against him. On the contrary, the fact that he was able to cite specific dates should constitute evidence in support of his credibility.

5.16 Concerning the State party's argument that the Committee should not substitute its own view of the facts for that of the State Secretariat for Migration or undertake any examination of plausibility, the complainant notes that his case cannot be compared with the case of *M.O. v. Switzerland*, since, in the present case, there are serious procedural irregularities that have affected his case, while the available evidence does not support the finding that his statements during the asylum procedure are not convincing. As the Federal Administrative Court emphasized, the analysis of his case was only "summary". In accordance with the case law of the European Court of Human Rights in the *M.O. v. Switzerland* case, it is precisely the fact that the credibility assessment made by the Swiss authorities was carried out in an appropriate manner from a formal point of view that it was decisive for the Court. It should also be noted that, in that case, the complainant was heard three times by the Secretariat. Moreover, unlike the present case, his grounds for asylum were thoroughly examined by the Federal Administrative Court.

5.17 With regard to the State party's argument that the complainant was informed of the possibilities of assistance available to him that he could have used to good advantage at his own expense, the complainant recalls that he has no right to work and that he is therefore totally destitute. Consequently, he cannot be required to hire a lawyer.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any complaint contained in a communication, the Committee must decide whether the complaint 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.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of the remedies has been unreasonably prolonged, or that it is unlikely, after a fair trial, to bring effective relief to the alleged victim.<sup>60</sup>

6.3 The Committee notes that the State party challenges the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies. The State party asserts that the complainant did not show that the advance payment of fees requested prevented him from exhausting this remedy or that the remedy would have been pointless. The Committee also notes that the complainant considers that he is living in poverty since he is not permitted to work; that this situation prevented him from covering the legal fees; and that the requirement for an advance payment of 600 francs has denied him access to a thorough and diligent examination of his file by an independent judicial body.

6.4 The Committee considers that, given the complainant's personal circumstances, it was unfair to oblige him to pay the sum of 600 Swiss francs in order for his last application to be admissible. This view is based on the fact that the complainant is destitute, that he is not permitted to work in the State party's territory and that the assistance he receives amounts to only 415 Swiss francs per month. It therefore seems unreasonable to deny the complainant the possibility of applying for a review of his case on financial grounds considering his difficult financial circumstances.<sup>61</sup> The Committee recalls that all the applicant's arguments and evidence against the State Secretariat for Migration decision

<sup>60</sup> See the Committee's general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, paras. 13, 18 (e) and 34, which replaced general comment No. 1 as of 6 December 2017.

<sup>61</sup> *C.M. v. Switzerland* (CAT/C/44/D/355/2008), para. 9.2 and *Abdulkarim v. Switzerland* (CAT/C/62/D/710/2015), para. 6.2.

were only subject to an early and summary assessment by the Federal Administrative Court to determine the likely outcome of the proceedings, without an effective examination of his appeal having been carried out. This remedy was therefore not available to the complainant.

6.5 In these circumstances, the Committee concludes that the objection of inadmissibility on grounds of non-exhaustion of domestic remedies cannot be upheld in the present case. In the absence of any other question as to the admissibility of the complaint, the Committee declares it admissible given that it raises questions under articles 3 and 16 of the Convention and that the facts and basis of the complainant's claims have been duly substantiated,<sup>62</sup> and proceeds with the consideration on the merits.

#### *Consideration of the merits*

7.1 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.

7.2 In the present case, the Committee must determine whether, by returning the complainant to Eritrea, the State party would be in breach of its obligation under articles 3 and 16 of the Convention not to expel or return an individual to another State where there are substantial grounds to believe that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

7.3 The Committee notes the State party's conclusion that there is no indication that there are substantial grounds for fearing that he would face a specific and personal risk of being subjected to torture upon his return to Eritrea and that his allegations and evidence were considered implausible. The Committee notes, however, that the State party concedes that there is little information on the authorities' response to forced returns and that the State party appears to have accepted the likelihood that the complainant will be required to perform military service in Eritrea while not commenting on the compatibility of this practice with the rights under the Convention. In this regard, the Committee takes note of the report of the Special Rapporteur on the situation of human rights in Eritrea, in which she concludes the following: that the overall human rights situation in Eritrea remains grim since, among other things, the military/national service, which the Commission of Inquiry on Human Rights in Eritrea found reasonable grounds to believe constituted no less than the enslavement of a whole population, a crime against humanity, remains indefinite; that torture and other inhumane acts continue to be committed; and that detainees are especially vulnerable to human rights violations, including torture, as legal procedures and safeguards, such as access to family members, lawyers and doctors, are denied.<sup>63</sup>

7.4 In this context, the Committee takes note of the course of the complainant's asylum application procedure before the Swiss authorities. It notes the inconsistencies and contradictions in the complainant's statements and submissions, to which the State party has drawn attention. However, the Committee observes that the complainant was not provided with legal counsel during the proceedings before the State Secretariat for Migration, that he was heard in a language other than his mother tongue despite his express request in this respect and that the Swiss authorities based their reasoning on questioning of the genuineness of the documents produced by the complainant without having taken any measures to verify their genuineness. In this regard, the Committee recalls that the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or return, once that decision is made, when there is a plausible allegation that article 3 issues arise.<sup>64</sup> In the present case, the State party did not give the complainant the opportunity to demonstrate the risks he would face in the event of forced return to Eritrea. The Federal Administrative Court only carried out an early and summary assessment of the complainant's arguments while questioning the genuineness of the documents provided but without taking any measures to verify it. Furthermore, the requirement to pay legal fees when the complainant was facing financial hardship denied him the opportunity to apply to have his appeal

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<sup>62</sup> *K.A. v. Sweden* (CAT/C/39/D/308/2006), para. 7.2.

<sup>63</sup> *A/HRC/38/50*, para. 108 (b), (c) and (h).

<sup>64</sup> *Agiza v. Sweden*, para. 13.7.

examined by the judges of the Federal Administrative Court. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of an effective, independent and impartial review of the decision of the Secretariat to expel the complainant constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.<sup>65</sup>

8. In light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the complainant's deportation to Eritrea would constitute a breach of article 3 of the Convention. Having found a violation of article 3 were the complainant to be returned, the Committee does not consider it necessary to examine the claim under article 16 of the Convention.

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

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

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<sup>65</sup> General comment No. 4, para. 13.