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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 887/2018**, ***

Communication submitted by:	A.Y. (represented by counsel, Angela Stettler)
Alleged victim:	The complainant
State party:	Switzerland
Date of communication:	11 October 2018 (initial submission)
Document references:	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 5 July 2019 (not issued in document form)
Date of adoption of decision:	22 July 2022
Subject matter:	Risk of torture in case of deportation to Eritrea (non-refoulement)
Procedural issue:	Manifestly unfounded, credibility assessment
Substantive issues:	Torture and cruel, inhuman or degrading treatment or punishment
Article of the Convention:	3

1.1 The complainant is A.Y.,[1] an Eritrean national, born in 1984. Following the rejection of her asylum request, a deportation order was issued for her return to Eritrea. The complainant claims that her removal violates the State party's obligations under article 3 of the Convention. The complainant is represented by counsel, Angela Stettler.

1.2 On 12 October 2018, pursuant to rule 114 of its rules of procedure the Committee, acting through its Rapporteur on new communications and interim measures, requested the State party not to deport the complainant while the complaint was being considered. On 16 October 2018, the State party confirmed that it had suspended the complainant's deportation.

Facts as presented by the complainant

2.1 The Complainant is an Eritrean citizen of Tigrinya ethnicity, from Zoba Debub in the south of Eritrea. When she was 16 years old, her family decided that she should be married. She therefore left school and was married, moving to live with her husband in Adi Gefah.

* Reissued for technical reasons on 22 February 2023.

** Adopted by the Committee at its seventy-fourth session (12–29 July 2022).

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

[1] Anonymity is requested.

Her husband was carrying out national service at the time. In July 2005, the complainant gave birth to a daughter. The couple divorced in 2006.

2.2 After the divorce, the complainant moved to Asmara, with her daughter, where she was a domestic worker for a family. After work, she would sell clothes on the street. She always took her daughter in order to avoid being rounded up for national service.[2] In February 2013, the complainant left home in the early morning before starting work to buy bread. She left her daughter at home. She was apprehended by the authorities and brought to the police station, where she was held until the evening. She informed the police officers that she needed to return home to her daughter, who had been left alone. Later the same evening, her identity was registered and she was told to remain available for national service. She was then released.[3]

2.3 Afraid that she would be arrested again, the complainant decided to leave Eritrea. She left her daughter with her mother and arranged her journey through an acquaintance. She travelled through the Sudan, Libya and Italy, arriving in the State party on 6 August 2014. She made an application for refugee status in the State party on 7 August 2014.

2.4 The complainant attended an initial hearing on 22 August 2014. On 12 August 2015, the substantive hearing was held, during which she provided detailed testimony on the substantive grounds for requesting international protection.

2.5 On 30 October 2015, the State Secretariat for Migration rejected her asylum application. It did not find the complainant's account credible owing to inconsistencies in her explanation of the events leading up to her leaving Eritrea. In particular, during her initial interview, the complainant had stated that the Paradiso administration had told her that she would be called on for military service and that she was to contact them between January and April 2013 on that matter. In addition, she claimed to have been afraid of being arrested in a raid. However, it was only during the substantive hearing that she had submitted that in February 2013, she had been rounded up and taken to the police station, whereupon she had been informed that she should remain available for national service. The State Secretariat determined that her later description of the arrest implied that it was fabricated in order to strengthen her asylum claim. It further noted that during the substantive hearing, the complainant had stated that, at the time of her arrest, she had briefly left her daughter at home to buy bread, whereas she would usually take her along to work in order to avoid being arrested. Later in the same hearing, however, the complainant had claimed that she had been on her way to work when she was picked up by the police. The State Secretariat also referred to the complainant's narrative of her journey as vague, which led it to conclude that she did not leave Eritrea illegally, as she had claimed. It also found it incomprehensible that the complainant would have waited three months after being arrested to leave the country. The State Secretariat therefore determined that the author's claims were fabricated and that she therefore lacked credibility. It did not find any indication that the complainant would be exposed to treatment prohibited by article 3 of the European Convention on Human Rights, if she were returned to Eritrea.

2.6 On 3 December 2015, the complainant appealed the decision of the State Secretariat for Migration to the Federal Administrative Court. In support of her appeal, she submitted a very detailed itinerary of her journey to the Sudan. She also clarified statements regarding her arrest, explaining that she had referred to buying bread, meaning doing chores, errands or business, which had been misinterpreted as working and that her narrative was entirely consistent. She requested an interim order suspending deportation while her appeal was considered.

2.7 On 10 December 2015, on an initial assessment the Federal Administrative Court determined that the complainant's appeal had no reasonable prospect of success, as none of

[2] A/HRC/26/45, para. 28.

[3] The military police carry out routine conscription *giffas*, in homes, workplaces, the street or other public places, with the aim of rounding up persons considered fit to serve, draft evaders and those who have escaped from national service, including minors. Opposing such a round-up can lead to on-the-spot execution, as deadly force is permitted against those resisting or attempting to flee.

her evidence called decision of the State Secretariat for Migration into question. The interim application was therefore denied.

2.8 In its final judgment, on 14 January 2016, the Federal Administrative Court denied the complainant's appeal as it considered that claims concerning her life in Eritrea, her reasons for fleeing and the circumstances of her departure were partly contradictory and thus not credible. In particular, the Court cited the complainant's account at her screening interview that from 2005 to 2013, she was a domestic worker, whereas at the substantive interview she claimed to have worked as a trader. The Court did not find it plausible that the complainant had been able to save 1,500 Swiss francs to finance her journey.[4] Finally, it did not find it credible that she had been able to contact a facilitator and leave the country within a day. In the light of these elements, the Court concluded that removal to Eritrea was not unreasonable or contrary to her rights under article 3 of the Convention or article 3 of the European Convention on Human Rights.

2.9 The complainant argues that, in the first instance, the State Secretariat for Migration did not take into account that the screening interview was summary in nature and that she had been explicitly instructed at the outset to keep her account brief, as her grounds for asylum were not the focus of the screening interview, but rather would be examined at the subsequent substantive asylum interview.[5] Furthermore the transcript confirms that the screening interview was held in a particularly cursory manner owing to lack of staff.[6] The complainant's understanding was that she was expected to give only a summary account of the events leading to her escape from Eritrea. She therefore only mentioned that she was told to do military service and that she feared to be picked up during a raid. She did not mention the circumstances in which she had been told to do military service (i.e. when she was in police custody after being rounded up during a raid) as she had been asked to summarize her reasons for fleeing. She also submits that she explained in the substantive interview that she had not mentioned that the police had arrested her and kept her during a day for this reason. The complainant refers to the jurisprudence of the European Court of Human Rights in the case of *M.A. v. Switzerland*, in which it held that the difference in the nature of the two hearings could not be disregarded when assessing credibility.[7] She therefore submits that the difference in the nature of the two hearings and the fact that the screening interview was held in a cursory way explain why she only provided details of her arrest during a raid, and that she explained the fact that she had been told explicitly on that occasion to be ready for national service more precisely in the substantive interview.

2.10 The complainant states that she did not make contradictory statements regarding the reasons she had left without her daughter to buy bread. Rather, there was a misunderstanding at one point during the second interview. The complainant said that she was on her way to do some business (in the sense of buying some food). The translator obviously misunderstood her and translated that she was on her way to work. Yet, from her earlier statements, it was made clear that the complainant was not on her way to work that morning. The complainant points to the fact that she had stated several times that she was on her way to buy bread. She also explained that she always took her daughter with her when she went to work in order not to be picked up by the police, but that she did not take her daughter with her that morning. as she wanted just to buy bread and then return home. The complainant argues that her account has been consistent throughout and therefore that her story is credible. She argues that the assessment of the State Secretariat for Migration is incorrect, particularly as she gave a detailed account of her departure.[8]

[4] The complainant also stated that her journey from the Sudan to Europe had cost $3,400, that it was financed with the help of her cousins residing in the United States of America and that she had lost her identity card during the journey.

[5] On the first page of the transcript of the initial interview, the following is stated: "Your flight reasons: summarize the most important, a more in-depth interview will follow."

[6] Following the questions about her flight reasons is noted: "Due to capacity reasons shortened interview regarding grounds for asylum."

[7] Application No. 52589/13, Judgment, 18 November 2014.

[8] The complainant refers to the record of her substantive interview in which she explained how she left Eritrea.

2.11 The complainant further argues that the reasoning of the Federal Administrative Court was superficial and brief, and that it had clearly failed to consider her statements, as it incorrectly reported details of her account of events in its judgment, basing parts of its findings on that incorrect reporting, and that this is further reflected in its failure to address some of the arguments in her appeal.

2.12 The complainant claims that her deportation from Switzerland to Eritrea would expose her to a real risk of torture. She notes the consistent pattern of gross and flagrant violations of human rights in Eritrea and refers to the conference room paper of the commission of inquiry on human rights in Eritrea in which it noted that: "Torture is widespread throughout Eritrea. It is inflicted on detainees … but also on national service conscripts during their military training and throughout their life in the army… The commission finds that the recurrence and prevalence of certain torture methods constitute strong indications that torture is systemic and inflicted in a routine manner." The complainant further notes that in the same paper it is noted that: "Individuals forcefully repatriated are inevitably considered as having left the country unlawfully, and are consequently regarded as serious offenders, and also as 'traitors'. A common pattern of treatment of returnees is their arrest upon arrival in Eritrea. They are questioned about the circumstances of their escape, whether they received help to leave the country, how the flight was funded, whether they had any contact with opposition groups based abroad, etc. Returnees are systematically ill-treated to the point of torture during the interrogation phase."

Complaint

3. The complainant therefore claims that due to the fact that she left Eritrea illegally, without a passport and exit visa, is over 18 and therefore eligible for and subject to mandatory national service, having already been arrested and registered with the authorities, she faces a real risk of arbitrary detention, torture and ill-treatment if she returns to Eritrea, in violation of article 3 of the Convention. She states that the Eritrean authorities at the airport will immediately arrest and detain her, interrogate her using methods meeting the definition of torture and that the authorities will quickly establish that she left the country illegally and that she is of military age. As illegal exits are intrinsically regarded by the authorities as political dissent, she will be harshly treated, subjected to punishment and conscripted throughout which process she will be subjected to torture.

State party's submissions on the merits

4.1 On 12 April 2019, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party notes that article 3 of the Convention provides that no State party shall expel, return or extradite 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. In determining whether there are such grounds, the competent authorities shall consider all relevant considerations, including, where appropriate, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

4.3. The State party notes that the Committee has given concrete expression to the elements of article 3 in its case law and has, in particular, issued precise guidelines concerning the application of its provisions in its general comment No. 4 (2017), in which it states that the complainant must prove that there is a foreseeable, imminent, personal and real risk of torture if deported to the country of origin. Moreover, the existence of such a risk must appear to be serious, which is the case where the allegations are based on credible facts. Elements that must be taken into account in order to conclude the existence of such a risk, include, inter alia, evidence of the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, allegations of torture or ill-treatment suffered by a public official in the recent past; the existence of and access to evidence from independent sources to substantiate allegations of torture or ill-treatment; allegations of torture or ill-treatment that may be inflicted on the author or his or her entourage as a result of the proceedings before the Committee; the author's political activities inside or outside the State of origin; evidence of the author's credibility and the general veracity of his or her allegations, despite certain inconsistencies in the presentation of the facts or certain failures in the pleadings.

4.4 The State party notes that the Committee must consider all relevant considerations, in accordance with article 3 (2) of the Convention, including the existence of a consistent pattern of violations of the rights of the author by the State. However, the question is whether the applicant would be in "personal" danger of being subjected to torture in the country to which she would be returned.[9] It follows that the existence of a pattern of human rights violations does not constitute sufficient grounds for concluding that an individual would be in danger of being subjected to torture upon return to his or her country. Additional grounds must therefore exist for the risk of torture to be classified, as "foreseeable, present, personal and real".

4.5 The State party refers to the complainant's allegations that the national authorities have carried out only a cursory examination of her arguments relating to the risks of torture and ill-treatment in the event of her return to Eritrea, that the reasoning of the Federal Administrative Court is comparatively superficial and brief, wholly failing to take into account the complainant's statements, and that the authorities did not carry out the necessary investigations to determine the effective nature of the alleged risks of torture and ill-treatment. In response to these allegations, the State party sets out its practice with regard to the processing of asylum applications from Eritrean nationals, the essential points of which, are drawn from the Committee's decision in the case of *M.G. v. Switzerland*.[10]

4.6 With regard to the assessment of the risk of persecution in Eritrea in general, the State party refers to the jurisprudence of the Federal Administrative Court, which has held that refugees do not include persons who fear harm on the grounds that they have refused to serve in the army or have deserted.[11] It further submits that the State Secretariat for Migration regularly evaluates reports concerning Eritrea and engages in ongoing information exchange with experts and partner authorities. On that basis, it keeps an up-to-date country inventory that serves as a basis for decision-making and asylum practice. In particular, it refers to a report prepared by the Secretariat in May 2015, entitled "Eritrea - country study", bringing together all the information it had collected. It notes that this report has been validated by four partner authorities, a scientific expert and the European Asylum Support Office (now the European Union Agency for Asylum).[12] In February and March 2016, the Secretariat carried out an on-site mission to Eritrea to review, deepen and complete the information, adding sources that have since emerged. The State party further notes that on 10 August 2016, the Secretariat published an update to the original report and refers to the similar conclusions contained in reports published between December 2015 and July 2018, by a number of national authorities (for example, in Sweden, Norway and the United Kingdom of Great Britain and Northern Ireland).

4.7 The State party explains that in June 2016, the Swiss asylum authorities changed their practice regarding illegal departures from Eritrea, as confirmed by the Federal Administrative Court in later decisions, in particular by the judgment of the Court of 30 January 2017.[13] In these judgments, the Court examined, in great detail, the situation in Eritrea on the basis of a large number of sources.[14] The conclusion of these analyses was that an illegal exit from Eritrea is no longer sufficient, in itself, to justify recognition of refugee status. There is even a question as to whether the penal provisions on illegal departure are still applied, given that because of the massive "brain-drain" currently facing Eritrea, the Eritrean authorities no longer proceed rigorously against nationals returning to the country.[15] A major risk of punishment in the event of return can now be accepted only in the presence of factors, additional to the illegal exit, that make the asylum seeker appear to be an undesirable person in the eyes of the Eritrean authorities. The treatment of rejected applicants depends on the manner in which they return to the country, namely free or forced return. According to information from the Swiss asylum authorities, the State party submits that the free return of Eritreans whose asylum claims were rejected ensures that they have a privileged status known

[9] *M.D.T. v. Switzerland*, (CAT/C/48/D/382/2009), para. 7.2.
[10] *M.G. v. Switzerland*, para. 4.4.
[11] Judgment D-6764/2017, 14 May 2018, para. 3.3.
[12] See European Asylum Support Office, *Eritrea. National Service, Exit, and Return*, September 2019.
[13] Judgment D-7898/2015, 30 January 2017.
[14] Judgment D-2311/2016, 17 August 2017, and judgment E-5022/2017, 10 July 2018.
[15] Judgment D-2311/2016.

as “diaspora”. Such people are indeed “rehabilitated” and exempted from national service for at least three years; they are thus not at risk of State persecution in connection with their departure from the country.

4.8 As regards the lawfulness and enforceability of removals of persons not granted refugee status, the State party refers to the acknowledgement by the Federal Administrative Court that it appeared from the numerous sources of information consulted that all Eritrean nationals, men and women, were required to perform national service.[16] The basic training to be carried out in this context could last up to six months before the persons concerned were incorporated into military or civilian service for a period of between 5 and 10 years.[17] The Court also admitted that living conditions were difficult, both during basic training and during national service, and that the sources consulted referred in particular to ill-treatment and sexual abuse.

4.9 The State party therefore cites the analysis of the Federal Administrative Court, which held that the obligation to perform national service constituted a burden which did not, in itself, prevent an applicant being returned to Eritrea. Furthermore, the European Court of Human Rights prohibits such an action only where there is a serious risk of a flagrant violation of the prohibition of forced labour, a risk which the Court denied at the end of its examination. Thus, the conditions prevailing in the Eritrean national service are certainly problematic, but not to the point of making removal unlawful. Moreover, ill-treatment and sexual abuse are not committed in such a generalized way that this assessment must be reviewed.[18] The Court also denied that in the event of a voluntary return to Eritrea, there would generally be a serious risk of imprisonment and thereby inhuman treatment.[19] Finally, it also noted that Eritrea is not at war, nor is there a civil war or a situation of generalized violence and that since 2005, when the humanitarian situation was considered desperate, living conditions in the country have improved.[20]

4.10 In the light of the current practice of the State Secretariat for Migration referred to above and the detailed case law of the Federal Administrative Court, the State party considers that the two authorities have each carried out a detailed and duly reasoned examination of the situation prevailing in Eritrea and of the nature of the risks of torture or ill-treatment alleged by the author, relating both to national service and unlawful departure from the country.

4.11 In view of the risks arising from recruitment into national service, the State party points out that the possibility of being called upon to perform national service at one’s home in Eritrea does not justify the granting of refugee status, as the practice of the Eritrean authorities described above does not, in itself, constitute a decisive measure of persecution in matters of asylum, nor does it constitute a risk of treatment contrary to article 3 of the Convention for that reason, nor indeed for any other reason. Furthermore, the human rights situation in general is not, in itself, sufficient to render the applicant’s removal incompatible with article 3 of the Convention. The same applies to the existence of the obligation to carry out national service.

4.12 As to the allegations relating to the author’s unlawful departure, the State party recalls that the complainant’s statements regarding the circumstances of her departure were contradictory and inconsistent, so that they were considered by both the State Secretariat for Migration and the Federal Administrative Court to be implausible. Since the author could not make her illegal departure from Eritrea plausible, she has thus failed to render plausible the allegations that she would be exposed to treatment prohibited by article 3 of the Convention in the event of her return to Eritrea. In that connection, the State party cites the case law of the European Court of Human Rights, in its judgment in the case of *M.O. v. Switzerland* of 20 June 2017, in which it held that: “The Court shares the views of the Upper Tribunal that a person whose asylum claim has not been found credible cannot be assumed to have left Eritrea illegally, and that being a failed asylum-seeker is not in itself sufficient for a person

[16] Judgment E-5022/2017.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Judgment D-2311/2016.

to face a real risk of treatment contrary to Article 3 of the Convention upon his or her removal to Eritrea."[21]

4.13 Insofar as the complainant criticizes the domestic asylum proceedings, in which her claim was found to be implausible, the State party notes that these allegations are not sufficient to undermine the findings of the competent national authorities. Since it remains the position of the State party that the complainant's statements were contradictory on essential points of her account, in particular on her reasons for leaving Eritrea and on the summons to national service, it reaffirms its support for the reasoning of both the State Secretariat for Migration and the Federal Administrative Court that the applicant was not able to demonstrate the plausibility of her remarks.

4.14 The State party further notes that in her communication the complainant is selective in her use of country-specific information. Indeed, her arguments are largely supported by reports of Human Rights Watch and Amnesty International, which are in turn based solely on statements by people who have left Eritrea. Furthermore, they do not contain any information on the treatment of persons accused only of illegal exit from the country (and no other grounds such as desertion or draft evasion), while a number of European countries (Norway, Sweden, Switzerland) have published reports that are based on broader and more differentiated sources (including on-site research).

4.15 The State party further notes that the complainant quotes extensively from the conference room paper containing the detailed findings of the commission of inquiry on human rights in Eritrea. However, the commission explicitly mentions the lack of cooperation of the Government of Eritrea in the collection of information relevant to the preparation of the paper and the impossibility for the members of the commission to travel to Eritrea to carry out their mission.[22] Thus, the State party contends that the content of that report is based on facts and evidence reported by third parties and not on the first-hand findings of the commission, so that the author cannot derive from it a probative value superior to that of other sources.

4.16 The State party goes on to state that, in the light of the evidence submitted by the complainant, it considers that the content of the reports she cites is not sufficient to demonstrate that she is personally and genuinely exposed to the risks set out therein. On this point, it recalls that the national authorities in charge of the asylum procedure carried out a careful analysis of the risks incurred by the applicant and concluded that there was no concrete evidence to support the conclusion that if she returned to her country of origin, she would be exposed to penalties or treatment prohibited by article 3 of the Convention.

4.17 The State party also states that its asylum authorities concluded that the author's statements concerning her detention were not plausible and therefore it could legitimately be concluded that the author had never been arrested or imprisoned by the Eritrean authorities. The author herself also indicated, during her summary hearing, that she had never had any problems in her country of origin.

4.18 The State party distinguishes the complainant's communication from the facts forming the basis of the case of *M.G. v. Switzerland*, in which the Committee found a violation.[23] By contrast, in the present case, the complainant's hearing was conducted in her mother tongue, the authenticity of the documents produced was not a decisive factor in assessing the veracity of her claims and, above all, the Federal Administrative Court carried out a detailed and reasoned assessment of the merits of the author's allegations. The State party concludes therefore that in the present case, it is apparent, in particular from the decisions of the national asylum authorities, that the author's allegations are not credible and that her statements do not in any way support the conclusion that there are substantial grounds for believing that she would be exposed to torture if returned to her country of origin.

4.19 The State party reaffirms the findings of domestic decision makers but highlights the following elements:

[21] Application no. 41282/16, Judgment of 20 June 2017, para. 79.
[22] Paras. 4–5.
[23] CAT/C/65/D/811/2017, para. 8.

(a) At her summary hearing on 22 August 2014, the applicant indicated that she feared being raided by the police but said that she had never had any problems with the police until then. At her second hearing, however, she mentioned that she had been the victim of a police raid and had to spend a whole day in a police station, which would have led her to flee Eritrea. Consequently, she failed to mention, at the first hearing, the decisive factor of her fear of being compelled by the national authorities to undertake national service. This is all the more surprising and not very credible because she mentioned in her first interview that she had never encountered any problems with the national authorities. The State party maintains that such discrepancies could not be explained by the summary nature of the first hearing;

(b) Furthermore, the author stated at her first hearing that it was the administrative authorities who had told her to be available for national service while she then claimed that it was the police officers who had arrested her.

4.20 In the light of the foregoing, the State party submits that there is no indication that there are substantial grounds for fearing that the author would be exposed to foreseeable, present, personal and real risks of torture or ill-treatment if returned to Eritrea. It therefore invites the Committee to find that the return of the author to Eritrea does not constitute a violation of the international commitments of Switzerland under article 3 of the Convention.

Author's comments on the State Party's observations

5.1 On 31 July 2019, the complainant submitted comments on the State party's observations on the admissibility and merits of her communication.

5.2 The complainant notes the State party's allegation that her communication cited sources selectively to support her claims that relied predominantly or solely on declarations from people having fled Eritrea, indicating that these were not reliable and that as the State party and other European countries relied on published reports based on more comprehensive and differentiating sources that confirmed that illegal exit per se does not suffice to justify refugee status.

5.3 The complainant notes however, that there is strong evidence that the fact-finding missions and the policy changes referenced by the State party as grounds for its conclusion were at least partly flawed and conducted with the sole purpose of reducing the number of asylum claims of Eritrean nationals. She refers to the guidance of the British Home Office, published in March 2015 and based on a visit in December 2014, and notes that in January 2017, the Public Law Project obtained information which revealed that even the Home Office itself, had before publishing the said guidance, doubted the reliability of statements made by Eritrean government officials during its visit.[24] The complainant notes in particular that in October 2016, the Upper Tribunal of the United Kingdom handed down a landmark judgment, in which it discussed the report on its fact-finding mission at length. It found that contrary to the published guidance of the Home Office,[25] evaders and deserters were harshly punished and that this was a common thread running through the majority of source evidence. According to the Tribunal, people who had left the country illegally and evaded military service continued to face persecution or serious harm. Following that decision, the Home Office withdrew its country guidance publication.

5.4 The complainant submits that the Upper Tribunal of the United Kingdom critically analysed a number of fact-finding mission reports. In regard to a fact-finding mission undertaken by Denmark, it stated that there were more reasons than usual to be cautious about attaching weight to the evidence of the Minister of Foreign Affairs of Eritrea, since he had a vested interest in defending the Government's position and reputation. The Tribunal also found a basis for believing that the evidence of a regional non-governmental organization (NGO) based in Asmara, whose evidence was deemed to be more balanced, was also likely to be beholden to the Government as the NGO representative's statement that the country had "no … corruption" was at odds even with the Government's own acknowledgement that

[24] See https://publiclawproject.org.uk/resources/home-office-disclosure-efforts-to-reduce-the-numbers-of-eritrean-nationals-granted-asylum/

[25] Home Office, Country Information and Guidance, Eritrea: Illegal Exit (September 2015).

corruption was an ongoing problem. The Tribunal went on to find that a person of, or approaching, draft age would be perceived on return to the country as a draft evader or deserter and that he or she would face a real risk of persecution or a breach of articles 3 and/or 4 (2) of the European Convention on Human Rights. The Tribunal further noted that where it was specified that there was a real risk of persecution in the context of performance of military/national service, it was highly likely to be for a Convention reason based on imputed political opinion. The Tribunal also held that: "A person who was likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and have signed (or are willing to sign) the letter of regret".[26] Furthermore, it found that even if such a person avoided punishment in the form of detention and ill-treatment, it was likely that he or she would be assigned to national service, which was likely to amount to treatment contrary to article 3 of the European Convention on Human Rights, unless he or she fell within one or more of the three exemptions allowed.[27] The Tribunal then concluded that there was no evidence of significant and durable change since October 2016 and dismissing the Government's guidance reverted to the pre-existing precedent. The Home Office then published new guidance in accordance with those findings.[28]

5.5 In addition, the complainant notes that different institutions, including the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Organisation Suisse d'Aide aux Refugiés doubt the diversity and therefore the usefulness of fact-finding missions to Eritrea, as they usually do not meet international standards of reliability through a balance of sources, as in each case migration offices normally only interview government representatives, diplomats in Asmara and other people dependent on the Government.[29]

5.6 Furthermore, the complainant notes that the three judgments of the Federal Administrative Court concerning Eritrean asylum seekers that were cited by the State party were handed down in January and August 2017 and July 2018, after the judgment of the Court in the present case. The complainant submits that it is therefore highly questionable to apply the practice set out in those cases in the present case, as this would result in unequal treatment compared to the Eritrean asylum seekers who submitted their claims at the same time as the complainant.

State Party's additional observations on the author's comments

6.1 On 26 September 2019, the State party submitted additional observations in response to the author's comments.

6.2 The State party notes the complainant's criticism of the approach taken by its authorities in assessing the situation in Eritrea. In that respect, it emphasizes that the asylum authorities in each individual case examine whether an asylum seeker would be in danger or face a real risk of being subjected to ill-treatment, contrary to article 3 of the Convention, if returned. It further states that when it comes to determining whether a person is in danger in his or her country of origin and whether there are concrete indications that he or she could be exposed to treatment prohibited by article 3 of the Convention, in the event of removal, the current situation in the said country must always be considered. In the rulings mentioned by the complainant, it notes that in fact the Federal Administrative Court has updated its assessment of the situation in Eritrea and, among other things, had also examined in detail the sources of information used.

[26] See MST and others (national service – risk categories (CG) Eritrea [2016] UKUT 00337 (IAC).

[27] European Asylum Support Office, *Eritrea. National Service, Exit, and Return*, para, 2.3.3.

[28] Home Office, "Country policy and information note. Eritrea: national service and illegal exit", July 2018, para. 2.4.12.

[29] See UNHCR, "Fact finding mission report of the Danish Immigration Service, 'Eritrea – drivers and root causes of emigration, national service and the possibility of return. Country of origin information for use in the asylum determination process', UNHCR's perspective", December 2014, and Organisation Suisse d'Aide aux Refugiés, "Erythrée: service national", 30 June 2017, p. 1 (in French only). See also Human Rights Watch, "Denmark: Eritrea immigration report deeply flawed", 17 December 2014.

6.3 In that context, the State party submits that it should also be noted that the question of forced return to Eritrea is not at issue, as it does not practice forced return of Eritrean nationals because Eritrea does not accept such returns of its nationals. Forced return is therefore impossible, so that there is no need to address the lawfulness of such a measure. However, it further notes that a voluntary departure is possible, provided that the applicant takes the necessary steps.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 As regards article 22 (5) (b) of the Convention, the Committee notes that the State party has not made any submissions in this regard and there is nothing else on file indicating that the complainant has failed to exhaust domestic remedies. Accordingly, the Committee considers that it is not precluded by article 22 (5) (b) of the Convention from examining the present communication.

7.3 The Committee notes the State party's argument that the communication is manifestly ill-founded and therefore inadmissible, pursuant to article 22 (2) of the Convention, in particular regarding the complainant's claims that the State party failed to comprehensively examine the risk she faces on return to Eritrea. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues under the Convention, which must be assessed on their merits. Accordingly, the Committee finds the communication admissible and proceeds to a consideration of the merits.

Consideration of the merits

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

8.2 In the present case, the issue before the Committee is whether the return of the complainant to Eritrea would constitute a violation of 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.

8.3 The Committee must therefore evaluate whether there are substantial grounds for believing that the complainant would personally be at risk of being subjected to torture upon return to Eritrea. In assessing that risk, the Committee must consider all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country. However, the Committee recalls that the aim of such a determination is to establish whether the individual concerned would personally be at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute a sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.[30]

8.4 The Committee recalls its general comment No. 4 (2017), according to which the Committee will assess "substantial grounds" and consider the risk of torture as foreseeable,

[30] *I.A. v. Sweden* (CAT/C/66/D/729/2016), para. 9.3, and *M.S. v. Denmark* (CAT/C/55/D/571/2013), para. 7.3.

personal, present and real when there are credible facts, relating to the risk by itself, existing at the time of its decision, which would affect the rights of the complainant under the Convention in the case of his or her deportation.[31]

8.5 The Committee recalls that the burden of proof is on the complainant, who must present an arguable case, that is to say substantiated through arguments, showing that the danger of being subjected to torture is foreseeable, present, personal and real. The Committee recalls that it gives considerable weight to findings of fact made by organs of the State party concerned; however, it is not bound by such findings. The Committee will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, considering all the circumstances relevant to each case. In that regard, the Committee observes that the infliction of cruel, inhuman or degrading treatment or punishment, whether or not it amounts to torture, to which an individual or the individual's family have been exposed in their State of origin, or would be exposed in the State to which the individual is being deported, constitutes an indication that the person is in danger of being subjected to torture if deported to such a State. Such an indication should be taken into account by States parties as a basic element justifying the application of the principle of non-refoulement.[32] In general comment No. 4 (2017), the Committee provides a non-exhaustive list of examples of human rights situations that may constitute an indication of risk of torture, to which States parties should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of non-refoulement[33] including: (a) whether, in the State of origin or in the State to which the person is being deported, the person has been or would be a victim of violence, including gender-based or sexual violence, in public or in private, amounting to torture;[34] (b) whether the person has been judged in the State of origin or would be judged in the State to which the person is being deported in a judicial system that does not guarantee the right to a fair trial;[35] (c) whether the person concerned has previously been detained or imprisoned in the State of origin or would be detained or imprisoned, if deported to such a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment;[36] and (d) whether the person concerned would be exposed to a sentence of corporal punishment if deported to a State in which, although corporal punishment is permitted by national law, that punishment would amount to torture or cruel, inhuman or degrading treatment or punishment according to customary international law and the jurisprudence of the Committee and of other recognized international and regional mechanisms for the protection of human rights.[37]

8.6 The Committee notes the complainant's submission that there are substantial grounds, based on numerous independent reports, as well as the treatment she was subjected to in the past, for believing that, upon removal to Eritrea, she will immediately be detained, interrogated, forcibly conscripted or otherwise imprisoned indeterminately and without due process, and subjected to abuse and mistreatment, amounting to torture, contrary to article 3 of the Convention.

8.7 The Committee also notes the State party's assertions that all the complainant's claims were duly weighed and assessed in an objective and comprehensive manner before two domestic instances, benefiting from regularly updated information and specific experience and expertise in matters of asylum, and that they had the benefit of considering all the information before them, including the complainant's oral evidence in both instances. The State party also notes that it cannot carry out forced returns of Eritrean nationals, based on the Eritrean policy of refusing to accept such measures, and therefore such a return is not currently a live issue.

[31] Para. 11.

[32] General comment No. 4 (2017), para. 28.

[33] Ibid., para. 29.

[34] See, for example, *Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009), paras. 10.5–10.7.

[35] See, for example, *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.4, and *Ali Fadel v. Switzerland* (CAT/C/53/D/450/2011), para. 7.8.

[36] See, for example, *Tony Chahin v. Sweden* (CAT/C/46/D/310/2007), para. 9.5, and *Tursunov v. Kazakhstan* (CAT/C/54/D/538/201), para. 9.8.

[37] See, for example, *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), paras. 8.5–8.8. General comment No. 4 (2017), para. 29 (g).

8.8. The Committee notes that the State party relied in its observations on the previous findings of domestic authorities that the author, in her first interview in August 2014, had stated that she feared being rounded up for national service, but when asked if she had had trouble with authorities in her country she answered that she had not. From this it was deduced that, when she later mentioned being rounded up and detained, this addition was an after-the-fact fabrication intended to strengthen her claim and therefore that the complainant was not credible. It also notes the complainant's allegation that the initial interview was presented as merely a cursory overview of her asylum claim and that she was explicitly told not to provide details at that time, as that was not the correct forum in which to do so, but was assured that she would be given the opportunity to elaborate further at her substantive interview. It also notes the complainant's claim, which is supported by the interview transcript, that the interview was noted to have been necessarily cut unusually short owing to staffing issues.

8.9 The Committee notes, in relation to the complainant's initial interview, that the transcript provided shows that at the beginning of the interview the instruction was given to provide her reasons for seeking asylum in a summary fashion, namely to mention only the most important things. Further details could be given at a later interview. Furthermore, when questioned as to the grounds for her asylum application, the complainant stated that she did not want to do national military service. When asked whether she had been in contact with the authorities regarding national service, the complainant said no but that she had always been told she would have to do it and that she should have reported for military service between January and April 2013. When asked where she should have reported, she stated that it was to the Paradiso administration. Then she was asked whether, apart from that, she had had any problems with the authorities. The complainant replied that although she was always afraid of raids but other than that she had not had any problems. The record shows that she was then asked whether she had been able to give all her reasons for requesting international protection; the response was in the affirmative but in brackets the transcript states: "Shortened questioning on the grounds for asylum due to lack of resources." It is not clear whether this was added by the complainant or the interviewer. In any case, the account in paragraphs 2.1–2.12 above sets out her grounds for seeking asylum. The Committee finds that the initial interview was cut very short, the questions asked and the time given for responses insufficient to allow those responses to be relied upon as representing definitive grounds for asylum. It also notes that when questions were raised in the substantive interview as to perceived inconsistencies, the complainant provided detailed and coherent responses. However, having interpreted the initial interview as representing her whole claim and therefore dismissing details added later as fabricated, the State party's immigration authorities dismissed her claims in their entirety. The Committee finds that having explicitly confined the first interview to a rudimentary summary of her claims, the State cannot then in good faith interpret her responses in an overly restrictive manner and use that later as a basis to exclude more detailed information that she had been assured she would be entitled to provide. It therefore finds that the State party failed to afford the complainant the benefit of the doubt and therefore failed to assess her claim comprehensively.

8.10 The Committee further notes the author's claim that the country information relied on by the State party in its adjudication of her asylum claim was not reflective of the reality in Eritrea and that two of the States referred to by the State party as sharing the position and findings of the fact-finding mission of its own authorities, Denmark and the United Kingdom, have both been roundly criticized for the lack of objectivity and impartiality in the sources they relied on. It also notes that the report of the European Asylum Support Office cited by the State party in paragraph 4.6 above, based on which it had concluded that national conscription was not alone a sufficient basis for granting refugee status, also includes statements that were not included or addressed by the State party, to the effect that: "Very little information exists about the Eritrean authorities' treatment of forcibly returned people, since in recent years there have been forced returns only from Sudan (and possibly from Egypt). Unlike voluntary returnees, people who have been forcibly returned cannot regularise their status with the authorities. All the information available points to the fact that, as in the case of a *giffa* or an apprehension during a flight attempt, their national service status is checked and then the procedure followed is the same as that adopted in the case of people apprehended in Eritrea. However, the imposition of a heavier sentence because the individual

left the country illegally is not ruled out."[38] The Committee notes the State party's claim that the information relied on by the complainant, which draws heavily on the testimony of individuals who have left Eritrea, is intentionally selective. In particular, it notes that the reports of Human Rights Watch, Amnesty International and the Special Rapporteur on the situation of human rights in Eritrea are used as examples of this. The Committee has nothing before it to indicate that the State party's judicial authorities carried out a detailed assessment of the source material relied on by immigration authorities or the complainant at any stage. It concludes that, on balance, if a particular source were to be given less weight, it should be any that were to be assessed as having a clearly vested interest in the narrative provided. That would appear to be more likely information provided by government agents or sources within the country, who might face reprisals for any perceived criticism of the Government of Eritrea. The State party's observations appear to indicate that the refusal of a State to engage with or to accept a fact-finding visit is a reason to dismiss the findings of the report of that fact-finding mission, and that information from individuals who have fled persecution is less reliable. On the contrary, the Committee finds that this interpretation would have a dissuasive effect on States engaging with human rights obligations and reduce transparency and accountability. Furthermore, where sources are drawn widely from civil society and citizens in exile, the information provided is more likely on balance to represent reliable, uncensored first-hand accounts, as persons outside the country who have fled are arguably no longer living under censorship. The State party has not indicated that these considerations were balanced or that it had any specific concerns as to the presence of duress, or that it was aware of reliable conflicting sources, which would undermine such individual testimony.

8.11 The Committee notes that in its most recent concluding observations, the Committee on the Elimination of Discrimination against Women remained deeply concerned about the serious impact of mandatory national service on women's rights.[39] It also notes the most recent findings of the Special Rapporteur on Eritrea:[40] draft evaders are not afforded due process, are presumed to know the reason for their arrest and detention, and the punishment provided for in article 37 of national service proclamation No. 82/1995 of two years in prison or payment of a fine is applied with no recourse to challenge the legality of their detention. Conscripts are routinely retained beyond the 18-month legal limit in extremely harsh living conditions for conscripts, suffering sexual abuse and severe punishment, in particular at Sawa military camp. Draft evaders and deserters who are caught face heavy punishment, including long periods of detention, torture and other forms of inhuman or degrading treatment. Asylum seekers who are returned to Eritrea reportedly face severe punishment upon their return, including prolonged periods of incommunicado detention, torture and ill-treatment, with women detainees exposed to multiple forms of abuse, including sexual violence, rape or threats of rape and sexual harassment with impunity.[41] Moreover, the Special Rapporteur has observed a deterioration in the human rights situation since the start of his mandate in November 2020, as a result of the country's involvement in the armed conflict in Ethiopia with indefinite national/military service further compounding it. He found that those who attempted to evade the draft were imprisoned in inhuman and degrading conditions for indefinite periods of time. The authorities also punished draft evaders by proxy, for example by imprisoning a parent or a spouse in order to force them to surrender themselves and that *giffa*, or round-ups for the purpose of military conscription, have dramatically intensified across the country.[42]

8.12 The Committee does not find that the State party has made its case regarding its claims as to the impartiality of the information relied on by the complainant, particularly as this accords with the findings of several of the treaty bodies and special procedure mandate holders in relation to returnees and the treatment of women under national conscription in Eritrea. It therefore concludes that in dismissing that information and failing to comprehensively examine the complainant's claims as a result of the negative credibility

[38] European Asylum Support Office, *Eritrea. National Service, Exit, and Return*, p. 37.

[39] CEDAW/C/ERI/CO/6, para. 10.

[40] See A/HRC/47/21.

[41] Ibid., paras. 38, 52 and 58.

[42] Statement of the Special Rapporteur on the situation of human rights situation in Eritrea, 13 June 2022.

finding, the State party failed to meet its own share of the evidential burden of adducing impartial and objective background information on the country from a wide range of sources to ensure that, regardless of its finding on credibility, it addressed the individual circumstances and risk profile of the complainant on the basis of uncontested facts, namely that she is a woman of conscription age and a failed asylum seeker, in the context of the available up-to-date country information. Owing to that credibility finding, the State party dismissed the complainant's entire claim as a fabrication and concluded that she faced no risk, without providing any detailed justification.

8.13 Accordingly, the Committee concludes that in the present case, the complainant does face a foreseeable, real, present and personal risk of being subjected to torture if she is returned to Eritrea. The Committee therefore considers that her return to Eritrea by the State party would constitute a violation of article 3 of the Convention.

9. In the light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the return of the complainant to Eritrea would constitute a breach of article 3 of the Convention.

10. The Committee is of the view that, pursuant to article 3 of the Convention, the State party has an obligation to refrain from returning the complainant to Eritrea.

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