CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 2345/02
by Mahmoud Mohammed SAID
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 5 October 2004 as a Chamber composed of

Mr A.B. BAKA, *President*,
Mr G. BONELLO,
Mr L. LOUCAIDES,
Mr K. JUNGWIERT,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 14 January 2002,

Having regard to the partial decision of 17 September 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mahmoud Mohammed Said, is an Eritrean national, who was born in 1967 and is currently staying in the Netherlands. He is represented before the Court by Mr G. Ris, a lawyer practising in Rotterdam.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 8 May 2001 the applicant arrived in the Netherlands, where, on 21 May 2001, he applied for asylum (*verblijfsvergunning asiel voor bepaalde tijd*) at the asylum application centre (*aanmeldcentrum*, "AC") at Schiphol. A first interview with an official of the Immigration and Naturalisation Department of the Ministry of Justice took place that same day, in order to establish the applicant's identity, nationality and travel route. The next day he was interviewed about the reasons for his request for asylum. The applicant submitted the following.

After having fulfilled his 18-months' military service from 1 December 1995, the applicant was again called up during a general mobilisation in April 1998. He served as a soldier in an anti-tank unit and fought in the war against Ethiopia. Whilst in the army, the applicant, who is a Sunni Muslim, was not allowed to practise his religion: fasting and praying were forbidden to him.

Although the war ended on 13 June 2000, demobilisation did not commence until considerably later because the Eritrean authorities feared further military incursions from the Ethiopians. In August 2000 a meeting was held with the applicant's battalion, consisting of between 5,000 and 7,000 men, in order to evaluate its performance in the war. According to the applicant, it is customary for such meetings to be held, and they allow the higher army echelons to cover up their mistakes by putting the blame for an unsuccessful campaign on the soldiers. During this meeting the commanders said the soldiers had not fought well. The applicant spoke up and said this was because the commanders had insisted that hungry, thirsty and tired soldiers should continue fighting at the front, which resulted in casualties. He said his unit should be replaced or strengthened. Other soldiers present at the meeting also voiced criticisms, saying there were not enough weapons, for example. However, when the applicant had spoken out, the other soldiers had voicefully supported him and an argument had ensued.

For some time after the meeting, the applicant had the feeling that the army authorities were keeping an eye on him; thus, he thought he was being followed whenever he visited other units and he was denied permission to

go to town. By the time he thought everything had been forgotten, he was summoned to the battalion's headquarters on 5 December 2000. There, he was informed that he had incited the soldiers. He was made to hand over his weapons and was detained in an underground cell for almost five months. He was neither interviewed, charged nor brought before a military tribunal.

On 20 April 2001 he was put into a jeep, with a driver and a guard who were armed. He was neither handcuffed nor bound. While driving, they happened upon a military vehicle that had had an accident. Both the driver and the guard got out of the car, leaving the applicant, who seized his chance and escaped through the back of the car.

The applicant made his way unhindered to Sudan, avoiding official border posts. An acquaintance of his in Khartoum brought him into contact with a travel agent who arranged for a passport and flight tickets. Accompanied by the travel agent, the applicant flew to Belgium via Syria and another, unspecified European country. From Brussels they took a train to Breda in the Netherlands. There, the travel agent told the applicant they had reached their destination. The applicant was told to hand back the passport to the travel agent and to report to a police station.

On 23 May 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*), applying an accelerated procedure, rejected the request for asylum, finding incredible the applicant's account of his alleged escape and implausible the reason for his alleged detention.

The applicant lodged an appeal with the Regional Court (*arrondissementsrechtbank*) of The Hague sitting in Amsterdam and also requested a provisional measure from the President of that court in order to stay his expulsion. Pending these proceedings the applicant submitted a written statement made by a certain Mr Khalifa, to the effect that Mr Khalifa's son had been executed in Eritrea in October 2000 after he had been staying with his mother for three months without having obtained prior permission from his army commanders. On 18 June 2001 the President of the Regional Court rejected the request for a provisional measure and, finding that further investigation could not reasonably contribute to the examination of the case, also dismissed the appeal. The President considered that the applicant's alleged desertion and his resulting fear of disproportionate punishment had not been made sufficiently plausible. It was unlikely that the army had still been mobilised at the time of the applicant's flight in April 2001, given that the war had ended in June 2000 and the army, by the applicant's own account, had evaluated its performance in the war at a meeting in August 2000. The applicant's claim that he stood accused of incitement was based on pure supposition. In view of the simple way in which the applicant had allegedly managed to escape, the President further found it unlikely that the (army) authorities wished to harm the applicant. Finding the applicant's account thus neither credible nor

plausible, the President deemed it unnecessary to hear Mr Khalifa as a witness.

The applicant filed a further appeal (*hoger beroep*) to the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), arguing *inter alia* that further investigation of the case, and in particular of the question whether the Eritrean army had been demobilised at the time of his desertion, was called for and feasible. If it turned out that the army had still been mobilised in April 2001, the reasoning adopted by the President of the Regional Court as to the lack of credibility and plausibility of the applicant's account would be invalidated. The applicant also applied for a provisional measure in order to be allowed to await the outcome of his further appeal in the Netherlands. He withdrew this application on 6 July 2001 in view of case-law of the Administrative Jurisdiction Division.

On 16 July 2001 the Administrative Jurisdiction Division rejected the further appeal. It held that the applicant's appeal to the Regional Court had not been rejected for reasons related solely to the mobilisation, but also for reasons related to the applicant's account of his arrest and escape. Given the conclusions reached by the President of the Regional Court to the effect that the Deputy Minister had not been wrong in labelling the applicant's account incredible, he (the President) had been entitled to decide not to hear Mr Khalifa as a witness. The fact that it was not in dispute that the applicant had served in the army did not affect this ruling.

B. Relevant domestic law and practice

On the basis of Article 29 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), an alien may be eligible for a residence permit for the purposes of asylum if, *inter alia*,

– he or she is a refugee within the meaning of the Convention relating to the Status of Refugees of 28 July 1951, or

– he or she has established that he or she has well-founded reasons to assume that he or she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment if expelled to the country of origin.

Requests which, after a first intake interview with the applicant, are adjudged to be inadmissible and/or manifestly ill-founded, may be dealt with in an accelerated procedure if they do not require a time-consuming investigation, meaning that they can be processed with all due care within 48 working hours. This fast-track procedure was introduced following a huge rise in the number of asylum applications that began in 1993.

An appellant may seek a provisional measure from the president of the Administrative Jurisdiction Division pending the proceedings on a further appeal in order to stay his or her expulsion (Article 8:81 of the General

Administrative Law Act (*Algemene Wet Bestuursrecht*) in conjunction with Article 39 of the Council of State Act (*Wet op de Raad van State*)). However, according to the President of the Administrative Jurisdiction Division in a decision of 9 November 2001, an application for a provisional measure will be inadmissible if the date of the expulsion has not yet been made known (nr. 200204991/2, *Jurisprudentie Vreemdelingenrecht* [Immigration Law Reports] 2002, 14). In a letter aimed at allaying the concerns expressed by legal practitioners in reaction to this decision, the President stated that, if an actual expulsion was imminent, it was at all times possible to lodge a (new) application for a provisional measure (letter of 11 February 2002, published in *Migrantenrecht* [Immigration Law Journal], 2002, nr. 2, p. 72).

C. The situation in Eritrea

1. Information submitted by the applicant

In support of his application, the applicant provided the Court with information relating to the demobilisation of the army and the treatment of deserters.

According to a report published on 25 August 2001 in the weekly news magazine "The Economist", the Eritrean army was yet to be demobilised.

A letter to the applicant's lawyer dated 27 May 2002 from the Horn of Africa-specialist of the Netherlands branch of Amnesty International, stated that it was usual for the Eritrean army to get together after an offensive and to conduct an evaluation of that offensive. It was also not unusual for a considerable time to pass between openly expressed criticism and arrest, or for deserters to be punished by their superiors without trial. Demobilisation of the Eritrean army had commenced in May 2002.

The applicant also submitted written statements made by two Eritrean nationals currently living in exile in Germany and the United Kingdom respectively. The first statement, dated 6 March 2002, related how a relative of the author was executed in April 1999, following this relative's voluntary return to the army after attending his brother's funeral without permission from his commanders. According to the second statement, made on 11 March 2002 by one of the founders and senior members of the Eritrean People Liberation Front and former governor of a provincial capital, "conscripts and soldiers who leave the army are hunted down and killed".

2. Netherlands policy on asylum seekers of Eritrean nationality

To help in the assessment of asylum applications and the establishment of whether it is safe to return rejected asylum seekers, the Minister of Foreign Affairs regularly publishes official country reports (*ambtsberichten*)

on the situation in asylum seekers' countries of origin. In drawing up these reports, the Minister uses published sources and reports by non-governmental organisations as well as reports by Netherlands diplomatic missions.

The decision of 23 May 2001, rejecting the applicant's request for asylum, was based on information in the country report of 20 October 2000. That report described Eritrea's conflict with Ethiopia and the hostilities that arose from it. The first series of hostilities ended in June 1998. Fierce fighting broke out again in February 1999, and there was small-scale fighting in September and October 1999. Full-scale war broke out again on 12 May 2000. On 18 June 2000, the two countries signed an agreement which has ended hostilities for the time being. Since then, the security situation has been good but the humanitarian situation has been worrying.

The country report made clear that merely coming from Eritrea does not constitute legal grounds for being admitted to the Netherlands. An asylum seeker has to show convincingly that his or her personal circumstances – viewed objectively – justify a fear of persecution as defined in refugee law or constitute grounds for the issue of a residence permit for the purposes of asylum because he or she would be subjected to treatment prohibited by Article 3 of the Convention if returned to the country of origin.

The country report of 1 March 2002 largely confirmed the findings of the previous report, although it also stated that deserters belonged to the categories of persons who, from a human rights point of view, ran a greater risk than others of encountering adverse treatment. With regard to penalties for desertion, it said that the maximum penalty for desertion during general mobilisation is life imprisonment or, in extreme cases, death. According to the country report these penalties and the question of whether they apply during war or peacetime are, however, largely theoretical. In practice, deserters are not tried in court, not even a military court. Instead, they are sentenced by their superiors and may be put to work in mining or road building for periods varying from six months to one year, until a new batch of recruits receives basic training. Those sentenced are then sent to join the new batch and afterwards into active service. There were reports that in May/June 2000, during the war with Ethiopia, deserters who were caught *in flagrante delicto* were executed.

The most recent country report, that of 14 May 2004, contained the same information as the aforementioned report as far as penalties for desertion were concerned. It added that it seemed likely that the severity of the punishment imposed on deserters depended on the specific circumstances of the person concerned, including whether the desertion took place in war or peace time, whether the authorities were aware of the desertion at the time, and the background of the individual.

The latest country report further stated that there had been reports of ill-treatment of deserters by police, and of disciplinary punishments, such as

extended exposure to high temperatures or binding of hands, being meted out to deserters in the army. There were also reports of deserters, who had served in the army for years but had left the army prematurely, being arrested in the course of round-ups. They had reportedly been sent back to barracks. In so far as could be established, these persons had not been ill-treated in the course of their arrest.

Given that there was a system of registrations for conscripts, it was assumed that deserters were also registered and therefore known to the authorities.

3. Other relevant international material

In its Annual Report 2003, covering events from January to December 2002, Amnesty International noted with respect to Eritrea *inter alia*:

> "The penalty for evading conscription or protesting against military service is three years' imprisonment, but in practice those caught are tortured and arbitrarily detained for several months with hard labour, before being forced back into the army. Methods of torture reported included being left for many hours in the hot sun, bound hand and foot, in some cases resulting in permanent injury."

An Amnesty International press release of 11 August 2003 expressed that organisation's concern about reported plans by the Libyan authorities to forcibly return seven Eritreans to Eritrea. These men had deserted from the Eritrean army at different times during 2002 and fled from Eritrea to Sudan and then to Libya, hoping to reach a country of asylum in Europe. The press release stated that hundreds of Eritreans had fled the country in the past two years, to Sudan initially, after deserting from national service or to escape conscription. Also, prisoners held in military detention included some held for opinions critical of the government or military authorities. According to the press release,

> "[I]f these seven Eritrean detainees are forcibly returned to Eritrea, they are at high risk of being arrested on arrival, and detained incommunicado and in secret without charge or trial for an indefinite period. They could face torture – which is routinely used by the military in Eritrea – and at least two of them who had been previously detained in Eritrea for political reasons could face extrajudicial execution."

The Amnesty International Annual Report 2004, covering events from January to December 2003, stated:

> "Torture continued to be used against some political prisoners and as a standard military punishment. Army deserters ... were tortured in military custody. They were beaten, tied hand and foot in painful positions and left in the sun for lengthy periods ('the helicopter' torture method), and suspended by ropes from the ceiling."

On 25 February 2004 the United States Department of State released the 2003 Country Report on Human Rights Practices in Eritrea. It stated *inter alia*:

> "The Government continued to authorise the use of deadly force against anyone resisting or attempting to flee during military searches for deserters ...; however, unlike the previous year, there were no reports of death. ...
>
> During the year, police severely mistreated and beat army deserters. ... Police detained deserters ... and subjected them to various disciplinary actions that included prolonged sun exposure in temperatures of up to 113 degrees Fahrenheit or the binding of the hands, elbows and feet for extended periods. ...
>
> The Government deployed military police throughout the country using roadblocks, street sweeps, and house-to-house searches to find deserters ..., although less intensively than last year."

COMPLAINTS

The applicant complained under Articles 2 and 3 of the Convention that his expulsion to Eritrea would expose him to a real risk of death, torture or inhuman or degrading treatment.

THE LAW

The applicant alleged violations of Articles 2 (right to life) and 3 (prohibition of torture and ill-treatment) of the Convention.

A. Exhaustion of domestic remedies

The Government argued that the applicant had failed to exhaust domestic remedies, in view of the fact that he had independently and voluntarily withdrawn his application for a provisional measure in the proceedings before the Administrative Jurisdiction Division.

The applicant submitted that, no date for his expulsion having been set at that time, his request would have been declared inadmissible in light of the case-law of the President of the Administrative Jurisdiction Division.

According to the Court's established case-law, the only remedies which must be tried under Article 35 § 1 of the Convention are those that relate to the breaches alleged and which at the same time are available and adequate, that is to say *inter alia*, that they offer reasonable prospects of success (see *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI). The Court will leave aside the question whether a provisional measure could be said to be capable of redressing the alleged breach of the Convention in the present case, as it agrees with the applicant that his request stood in any event no chance of success. In this context the Court notes that according to the case-

law of the President of the Administrative Jurisdiction Division, a request for a provisional measure will be declared inadmissible if the date for the expulsion has not yet been made known. No reproach can therefore be made of the applicant for withdrawing his request.

For these reasons the Court dismisses the Government's objection.

B. Alleged violation of Article 2 of the Convention

The applicant submitted that as a result of his desertion he ran a real risk of being executed if returned to Eritrea given that desertion during mobilisation is punishable by death. The applicant invoked Article 2 of the Convention, which provides, in so far as relevant:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

The Government were of the view that neither the applicant's account nor general sources on the situation in Eritrea could lead to the plausible conclusion that the applicant was at real risk of being executed if he returned to Eritrea.

The applicant insisted that, by expelling him to Eritrea, the authorities of the respondent Government would knowingly put him at such high risk of losing his life as for the outcome to be a near-certainty.

The Court considers that the complaint raised by the applicant under Article 2 is indissociable from the substance of his complaint under Article 3 in respect of the consequences of a deportation for his life, health and welfare (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 795, § 59). It is therefore more appropriate to deal globally with this allegation when examining the related complaint under Article 3.

C. Alleged violation of Article 3 of the Convention

The applicant alleged that he faced a real risk of torture and inhuman or degrading treatment or punishment at the hand of the Eritrean authorities in breach of Article 3, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Government, although not disputing that the applicant served in the army following the general mobilisation of April 1998, submitted that it was unlikely that he was a deserter. The war had ended in June 2000, there had been no more fighting and a first easing of the tension had emerged. Even though the applicant had left Eritrea a year before formal demobilisation began, it could not be ascertained whether or not the applicant had still been

active in the army just prior to his departure and, if not, what the reason for this was. In the view of the Government, the applicant's account of his escape from Eritrea lacked all credibility and his story of desertion was therefore not credible either.

The Government considered it implausible, firstly, that the applicant would not have been arrested for a remark made at a meeting in August 2000 until four months had passed, especially since he had been left undisturbed during this period and had not faced any problems. In addition, the applicant himself asserted that he had not been the only soldier to make critical remarks during the meeting and that his remarks had not especially deviated from the opinion of the superiors to whom he made them. The applicant's assertions about why and when he had been detained were wholly implausible. Second, it was not credible that the applicant – allegedly detained for four months – would have been transported unrestrained in an open jeep and left alone by his guards while they went to look at a traffic accident.

The applicant's account lacking credibility, the Government were of the opinion that it was therefore irrelevant whether or not he had been demobilised at the time of his escape. Moreover, given that, by his own admission, the applicant had never been politically active, there was no reason to believe that the Eritrean authorities view him as an object of suspicion, the more so as demobilisation would soon be complete. The Government concluded that the applicant had not demonstrated that, if he returned to Eritrea, he would face treatment in violation of Article 3 of the Convention.

The applicant insisted that his account was based on truth and that there were insufficient grounds to dismiss it as not credible without a rigorous scrutiny, which had not been carried out by the respondent State. Thus, although it was true that he had not been the only soldier to speak out during the evaluation meeting in August 2000, the fact remained that he had been the first to express criticism and that it had been his remarks which had been considered inflammatory. Indeed, contrary to the Government's assumption, the applicant had not at all agreed with his superiors: according to him, it was not the soldiers who had conducted themselves poorly in the war, it was the bad performance of the superior officers which had been entirely to blame for the large amount of casualties.

While he had not been arrested until four months after the meeting, he had been kept under observation. The applicant submitted that he should not be expected to second-guess the reason why the military had waited before arresting him. However, he believed – and was supported in this belief by the Horn of Africa-specialist of the Netherlands branch of Amnesty International – that this had been a deliberate strategy: had they arrested him immediately, the officers might have been confronted with protests in the rank and file.

The applicant further pointed out that his escape had not been as simple as made out by the Government. The soldiers in the jeep had been armed and there had thus been a risk that he might have been shot. In addition, sight should not be lost of the fact that handcuffs and special vehicles for the transport of prisoners were not as readily available in a developing country as they would be elsewhere.

The applicant maintained that, in the current climate in Eritrea, he ran a real risk of being subjected to treatment proscribed by Article 3 on account both of his criticism of the military and of his desertion.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the remainder of the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

A.B. BAKA
President