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

SECOND SECTION

CASE OF SAID v. THE NETHERLANDS

(Application no. 2345/02)

JUDGMENT

STRASBOURG

5 July 2005

FINAL

05/10/2005

In the case of Said v. the Netherlands,

The European Court of Human Rights (Second Section), sitting 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 deliberated in private on 5 October 2004 and 16 June 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 2345/02) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Eritrean national, Mr Mahmoud Mohammed Said ("the applicant"), on 14 January 2002.

2. The applicant, who had been granted legal aid, was represented by Mr G. Ris, a lawyer practising in Dordrecht. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant alleged that his expulsion to Eritrea would place him at risk of being executed and/or subjected to torture or inhuman or degrading treatment. He relied on Article 3 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 5 October 2004, the Chamber declared the application partly admissible.

6. After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 3 *in fine*).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1967 and is currently staying in the Netherlands.

9. 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*) 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 regarding the reasons for his request for asylum. The applicant submitted the following.

10. After completing his eighteen months' military service on 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.

11. Although the war ended on 13 June 2000, demobilisation did not commence until considerably later because the Eritrean authorities feared further military incursions by 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 was customary for such meetings to be held, and they allowed 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 that the soldiers had not fought well. The applicant spoke up and said that this was because the commanders had insisted that hungry, thirsty and tired soldiers should continue fighting at the front, which had resulted in casualties. He said that his unit should have been replaced or strengthened. Other soldiers present at the meeting also voiced criticism, saying, for example, that there had not been enough weapons. When the applicant had spoken out, the other soldiers had vociferously supported him and an argument had ensued.

12. For some time after the meeting, the applicant had the feeling that the army authorities were keeping an eye on him; for example, he thought he was being followed whenever he visited other units, and he was denied permission to go into town. On 5 December 2000, by which time he thought everything had been forgotten, he was summoned to the battalion's headquarters. 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, nor charged, nor brought before a military tribunal.

13. 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. During the drive, they happened upon a military vehicle that had had an accident. Both the driver and the guard got out of the car to see if they could lend assistance. The applicant, left alone, seized the opportunity and escaped through the back of the car.

14. 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 air 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. He asked him to hand back the passport and to report to a police station.

15. On 23 May 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*), applying an accelerated procedure, rejected the applicant's request for asylum. His failure to submit any document capable of establishing his identity, nationality or travel itinerary was held to affect the plausibility of his statements. Moreover, the Deputy Minister considered that the applicant's account of his alleged escape lacked credibility: it was hard to believe that someone who had been kept in detention for four months should have been transported unrestrained and been able to get away without being stopped by his guards, both of whom were alleged to have left him alone in the back of an open jeep in order to look at a traffic accident. The applicant was further held not to have substantiated his alleged detention. The comments he had allegedly made at the meeting in August 2000 were not of such a confrontational nature that he had well-founded reasons to fear persecution on that account, the more so bearing in mind that his comments did not particularly deviate from the opinion of the superiors to whom he claimed to have addressed them. Moreover, the applicant himself had stated that he was not the only soldier to have voiced criticism, yet neither had it been alleged, nor had it appeared, that any of those other soldiers had experienced problems as a result of their comments. The applicant had also not explained why he had not been arrested until four months later and had been left undisturbed in the meantime.

16. The applicant lodged an appeal with the Regional Court (*arrondissementsrechtbank*) of The Hague, sitting in Amsterdam, and also applied to the President of that court for a provisional measure staying his expulsion. Pending the outcome of these proceedings, the applicant submitted a written statement 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. He also submitted an identity card, a military identity card, a driving licence and a marriage certificate. On

18 June 2001 the President of the Regional Court rejected the application for a provisional measure and, finding that further investigation could not reasonably contribute to the clarification 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 established in a sufficiently plausible manner. It was unlikely that the army should still have been mobilised at the time of the applicant's escape in April 2001, given that the war had ended in June 2000 and that 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 ease with which the applicant had allegedly managed to escape, the President further found it unlikely that the (army) authorities wished to harm him. Thus, finding the applicant's account neither credible nor plausible, the President deemed it unnecessary to hear Mr Khalifa as a witness.

17. The applicant lodged a further appeal (*hoger beroep*) with 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 no longer stand up. The applicant also applied for a provisional measure allowing him to await the outcome of his further appeal in the Netherlands. He withdrew this application on 6 July 2001 in view of the relevant case-law of the Administrative Jurisdiction Division.

18. On 16 July 2001 the Administrative Jurisdiction Division dismissed the further appeal. It held that the applicant's appeal to the Regional Court had not been dismissed for reasons relating solely to the mobilisation, but also for reasons relating 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 describing the applicant's account as not credible, he (the President) had been entitled to decide not to hear evidence from 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.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Asylum

19. Under the terms of section 29 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), in force at the relevant time, an alien is eligible for a residence permit for the purposes of asylum if, *inter alia*,

(a) he or she is a refugee within the meaning of the Convention relating to the Status of Refugees of 28 July 1951; or

(b) 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.

B. Netherlands policy on asylum-seekers of Eritrean nationality

20. To help in the assessment of asylum applications and the establishment of whether it is safe to return unsuccessful asylum-seekers, the Minister for 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.

21. The decision of 23 May 2001 rejecting the applicant's request for asylum was based on information contained 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.

22. 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 issuing 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.

23. 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 stated that the maximum penalty for desertion during general mobilisation was life imprisonment or, in extreme cases, death. According to the country report, these penalties and the question whether they applied in time of war or in peacetime were, however, largely theoretical. In practice, deserters were not tried in court, not even a military court. They were sentenced by their superiors and put to work in mining or road building for periods varying from six months to one year, until a new batch of recruits received basic training. Those sentenced were then sent to join the new batch and, subsequently, into active service. There were reports that in May/June 2000, during the war with Ethiopia, deserters who had been caught in the act were executed.

24. The most recent country report, that of 28 February 2005, 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, including whether the desertion took place in time of war or in peacetime, whether the authorities were aware of the desertion at the time, and the particular circumstances of the individual concerned.

25. The same report further stated that there had been indications of ill-treatment of deserters by (military) police and security forces, and of disciplinary punishments, such as extended exposure to high temperatures or the binding of hands, being meted out to deserters in the army and resulting in permanent injury in some cases.

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

III. RELEVANT INTERNATIONAL MATERIAL

A. Material submitted by the applicant

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

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

29. 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 its performance. 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.

30. The applicant also submitted written statements 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 had been 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's Liberation Front and former governor of a provincial capital, conscripts and soldiers who left the army were "hunted down and killed".

B. Other relevant international material

31. In its Annual Report 2003, covering events from January to December 2002, Amnesty International noted with regard 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."

32. An Amnesty International press release of 11 August 2003 expressed that organisation's concern about reported plans by the Libyan authorities forcibly to 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. Prisoners held in military detention also included a number of persons who had expressed opinions critical of the government or the military authorities. The press release contained the following passage:

> "[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."

33. Amnesty International's Report 2004, covering events from January to December 2003, stated:

> "Torture continued to be used ... 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."

Amnesty International's Report 2005, covering events from January to December 2004, depicted an identical situation.

34. On 19 May 2004 Amnesty International published a report entitled "Eritrea: 'You Have No Right to Ask' – Government Resists Scrutiny on Human Rights". It described, *inter alia*, the forcible deportation back to Eritrea of some 220 Eritreans who had landed on the island of Malta in 2002, mainly as a result of shipwrecks or sea rescues, by the Maltese authorities in September and October of that year. According to the report, the deportees

> "... were all immediately detained on arrival in Asmara and sent to the nearby Adi Abeto military detention centre. ... As Amnesty International learned later, women, children and those over the conscription age limit of 40 years were released after some weeks in Adi Abeto Prison but the rest of the Malta deportees – mostly army deserters – were kept in incommunicado detention and tortured."

35. On 28 February 2005 the United States Department of State released the 2004 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 ...
>
> During the year, police severely mistreated and beat army deserters ... Security forces 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 ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. The applicant complained that he would be exposed to a real risk of being executed and/or of being subjected to torture or inhuman or degrading treatment contrary to Articles 2 and 3 of the Convention if he were expelled from the Netherlands and sent back to Eritrea.

37. In its decision as to the admissibility of the application, the Court held that it was more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3.

38. Article 3 of the Convention provides:

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

A. The parties' submissions

1. The applicant

39. 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.

40. He insisted that his account was truthful and that there were insufficient grounds to dismiss it as not credible without a rigorous examination, 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 poor performance of the superior officers which had been entirely to blame for the large number of casualties.

41. Although 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 (see paragraph 29 above) – 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.

42. The applicant further pointed out that his escape had not been at all straightforward. The soldiers in the jeep had been armed, and there had thus been a risk that he might be shot. In addition, it should not be overlooked that handcuffs and special vehicles for the transport of prisoners were not as readily available in a developing country as they might be elsewhere.

2. The Government

43. The Government, although not disputing that the applicant had 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 had begun, it could not be ascertained whether or not he had still been active in the army immediately prior to his departure and,

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

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

45. As the applicant's account lacked 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 viewed him with suspicion, especially 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 contrary to Article 3 of the Convention.

B. The Court's assessment

46. The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

47. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see, among other authorities, *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

48. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 36, § 107, and *H.L.R. v. France*, cited above, p. 758, § 37). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1856 and 1859, §§ 86 and 97, and *H.L.R. v. France*, cited above).

49. In determining whether it has been shown that the applicant runs a real risk, if expelled to Eritrea, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*. The Court has recognised in this context that direct documentary evidence proving that an applicant himself or herself is wanted for any reason by the authorities of the country of origin may well be difficult to obtain (see *Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports* 1998-I, p. 263, § 45). It is nevertheless incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail.

50. Turning to the circumstances of the present case, the Court notes that in the opinion of the Government the applicant's account of his arrest, of the reasons for it and of his escape is so implausible as to invalidate his claim of having deserted from the army. This being so, the Court must proceed, as far as possible, to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings (see *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004).

51. In this connection, the Court observes in the first place that the applicant's statements have been consistent, and, secondly, that he has submitted persuasive argument to rebut the Government's claim that his account lacked credibility. For example, he has provided information on the commencement of the demobilisation of the Eritrean army (see paragraphs 28-29 above), and has substantiated part of his account in that the Horn of Africa specialist of the Netherlands branch of Amnesty

International confirmed that the Eritrean army indeed conducted evaluation meetings after an offensive and that it was not uncommon for soldiers to be arrested some time after they had expressed criticism of their superiors (see paragraph 29 above). Even though this material does not relate to the applicant personally but concerns information of a more general nature, it is difficult to see what more he might reasonably have been expected to submit in the way of substantiation of his account and as a possible explanation for the four-month gap – used as an argument against him by the respondent Government – between his allegedly voicing criticism at the evaluation meeting in August 2000 and his arrest in December of that year.

52. Bearing in mind, however, that the Government did not explicitly dispute that the applicant had served in the Eritrean army following the general mobilisation of April 1998, the Court considers that a strong indication that the applicant was indeed a deserter lies in the fact that he applied for asylum in the Netherlands in May 2001, at a time when demobilisation had not yet begun and would not begin for another year. It is true, as the Government have pointed out, that the war had ended in June 2000, but the information available suggests that the authorities in Eritrea did not proceed to demobilise the troops with any great speed. On the contrary, with mention being made of roadblocks, street sweeps, and house-to-house searches in order to find deserters (see paragraph 35 above), it rather appears that the Eritrean authorities are eager to keep their army at full strength.

53. In these circumstances it is difficult to imagine by what means other than desertion the applicant might have left the army. Even if the account of his escape may appear somewhat remarkable, the Court considers that it does not detract from the overall credibility of the applicant's claim that he is a deserter.

54. The question remains whether the applicant is at risk of ill-treatment if he returns home. In this connection, and apart from the efforts made by the Eritrean authorities to apprehend deserters as already mentioned above (see paragraph 52), the Court further takes note of the general information from public sources describing the treatment meted out to deserters in Eritrea (see paragraphs 25 and 31-35 above), which ranges from incommunicado detention to prolonged exposure to the sun in high temperatures and the tying of hands and feet in painful positions. There can be no doubt that this constitutes inhuman treatment. Indeed, the most recent country report on Eritrea compiled by the Ministry of Foreign Affairs of the respondent Government also states that there have been reports of ill-treatment of deserters (see paragraph 25 above). Whereas the assumption is made in this report that the severity of the punishment will depend, *inter alia*, on whether the desertion took place in time of war or in peacetime, the Court observes that such a differentiation is not mentioned by the other sources. It is further to be borne in mind that it remains the applicant's

position that he was arrested and detained by the Eritrean military authorities after voicing criticism, and that he is therefore known to the authorities. In this connection, the Court also notes that it would in any event appear that the authorities in Eritrea have registered the names of deserters (see paragraph 26 above). Having regard, lastly, to the reports of the treatment meted out to a number of Eritreans deported from Malta, among them deserters (see paragraph 34 above), the Court considers that substantial grounds have been shown for believing that, if expelled at the present time, the applicant would be exposed to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

55. Accordingly, the Court finds that the expulsion of the applicant to Eritrea would be in violation of Article 3 of the Convention.

56. In the light of this finding, the Court considers that no separate issue arises under Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

58. In the applicant's submission, it should have been clear to the Netherlands authorities from the start that his asylum application was not one in which the accelerated procedure was appropriate. Had his case been dealt with in the normal procedure, he would have been housed in an asylum-seekers' accommodation centre and would have been entitled to weekly benefits. Furthermore, if the Netherlands had then, within the statutorily fixed period of six months, and after rigorous scrutiny of his claims, reached the conclusion that he should be granted a residence permit, he could subsequently have claimed monthly benefits. In total, and including statutory interest, the applicant claimed an amount of 30,000 euros in compensation for pecuniary damage.

59. The Government argued that the applicant's claim appeared to be connected with the parts of the application relating to Articles 6 and 13 of the Convention, which had already been declared inadmissible by the Court. As the applicant's expulsion had not yet taken place, the Government further found it difficult to understand how damage resulting from a potential violation of Article 2 or 3 could already have been sustained by the applicant.

60. Although the Government are correct in their observation that no breach of Article 3 has as yet occurred, the Court has previously held that where the implementation of a decision to extradite a person to a particular country would give rise to a breach of that provision, Article 41 of the

Convention must be taken as applying to the facts of the case (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 49, § 126).

Noting that the applicant has not based his claim in respect of pecuniary damage on the consequences of an expulsion in breach of Article 3 but rather on the manner in which his asylum application was processed by the Netherlands authorities – in respect of which no findings of a violation have been made – the Court sees no reason to award compensation for the alleged pecuniary damage.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that the applicant's expulsion to Eritrea would be in breach of Article 3 of the Convention;

2. *Holds* that no separate issue arises under Article 2 of the Convention;

3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mrs Thomassen;
(b) separate opinion of Mr Loucaides.

A.B.B.
S.D.

CONCURRING OPINION OF JUDGE THOMASSEN

In agreement with my colleagues, I find that the applicant's expulsion to Eritrea would be in breach of Article 3.

However, I would like to give additional reasons for being unable to follow the conclusion reached by the domestic authorities that the applicant's account was not credible.

The issue at stake is an extremely serious one: the expulsion of a person who fears that, in his country of origin, his life will be at risk or that he will be subjected to torture or inhuman treatment, that is to say, a possible infringement of the most fundamental values of the Convention.

What complicates the examination of the present and similar cases, however, is that the facts – as related by the person concerned – can often not, or can only partially, be established. This cannot always be held against that individual, because one can readily understand that adducing proof of the facts is often a difficult task.

At the same time, it is important to recognise that persons who have fabricated the reasons for their flight should not be able to benefit from asylum laws, because this could discredit the very important humanitarian right to asylum.

Insufficient facts will often result in the judge having to assess the reliability of the account given by the person concerned. Bearing in mind the subjective elements which are inherent in making such an assessment, judges will to a certain extent, in an area where the most fundamental human rights are at stake, find themselves on thin ice.

Given what is at stake, a conclusion that an asylum-seeker's account is not credible should therefore be based on a thorough investigation of the facts and be accompanied by adequate reasoning (see *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004).

Such an obligation does not follow from Article 6, which is not applicable to expulsion cases (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X), but flows directly from Articles 2 and 3, in my opinion. I would draw a parallel with other procedural aspects which, under the Court's case-law, can be derived from these provisions, such as the obligation to conduct an effective investigation into a homicide or into a credible assertion that someone has been subjected to treatment contrary to Article 3. Indeed, the Court has already held that an individual's claim that their deportation to a third country will expose them to treatment prohibited by Article 3 requires rigorous scrutiny (see *Jabari v. Turkey*, no. 40035/98, § 39, ECHR 2000-VIII).

However, in my view, no serious investigation was carried out in the present case.

In the first decision on the applicant's request for asylum, it was held against him that he had failed to provide documentary evidence of his identity. Yet, when he subsequently submitted a number of identity documents in the appeal proceedings before the Regional Court (see paragraph 16 of the judgment), the relevance of these for the assessment of the credibility of his account remained unaddressed.

The Regional Court concluded that the applicant's account was not credible, since it was not plausible that the general mobilisation should still have continued at a time when, by the applicant's own admission, the war had ended and the army had conducted an evaluation of its performance.

This test applied by the Regional Court for assessing the credibility of the applicant's account was defective because, despite the war having ended, the army did indeed remain mobilised.

When the applicant complained about this incorrect factual assumption to the Council of State, the reply was that this did not affect the impugned ruling since the decision of the Regional Court was also based on the lack of credibility of the applicant's account of his sudden arrest on 5 December 2000 and the relative ease with which he had allegedly managed to escape.

These considerations cannot, in my opinion, be regarded as an adequate justification for the conclusion that the applicant's account as a whole was invented. Given the facts, firstly, that deserters are sought out by the army and do run the risk of execution or ill-treatment, secondly, that the Netherlands authorities did not dispute that the applicant had served in the army, and, thirdly, that the applicant had in the meantime adduced proof of his identity, his account deserved more serious attention as soon as it was established that the general mobilisation was indeed still in force when the applicant left the army and fled to the Netherlands.

For me, this lack of rigorous scrutiny justifies the Court's decision not to follow the national courts' assessment. It also leads me to the conclusion that, given what is at stake, and noting those facts which have been established, despite persistent doubts as to what actually happened, the balance should tip in the applicant's favour.

SEPARATE OPINION OF JUDGE LOUCAIDES

I fully agree with the judgment in this case and its reasoning. However, I cannot agree with the inclusion in the judgment (see paragraph 35) of the United States Department of State Country Report on Human Rights Practices in Eritrea as a reliable source of information on the human rights situation in that country. This is because I do not consider such reports to be credible sources of information on human rights in any part of the world[1]. They are not prepared by an independent and impartial institution but by a purely political government agency which promotes and expresses the foreign policy of the United States. Therefore, they cannot by definition be relied on as a neutral and impartial exposition of the facts mentioned therein. There is always an element of suspicion that such reports are influenced by political expediency based on United States foreign policy with reference to the situation in the country concerned and that they serve a political agenda.

Therefore, I do not see how any judgment of the European Court of Human Rights can rely in any way or to any extent on any United States Department of State Country Report on Human Rights Practices in respect of any country.

1. See, for example, the United States Department of State yearly reports on human rights practices in Cyprus – the last one being that of 28 February 2005 – which make no reference at all to the grave organised and continuing violations of human rights in Cyprus by Turkey affecting thousands of people. These violations are set out in reports of the European Commission of Human Rights and judgments of the European Court of Human Rights; both of these institutions have examined relevant complaints under the European Convention on Human Rights after giving Turkey the opportunity to plead its case: see *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission's report of 10 July 1976, unpublished, and no. 8007/77, Commission's report of 4 October 1983, Decisions and Reports 72; and *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, and *Cyprus v. Turkey*, no. 25781/94, ECHR 2001-IV.