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

THIRD SECTION

DECISION

Application no. 69720/16
H.I.
against Switzerland

The European Court of Human Rights (Third Section), sitting on 21 November 2017 as a Committee composed of:

Pere Pastor Vilanova, *President,*
Helen Keller,
Alena Poláčková, *judges,*
and Fatoş Aracı, *Deputy SectionRegistrar,*

Having regard to the above application lodged on 25 November 2016,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr H.I., is an Eritrean national who was born in 1976 and lives in Switzerland. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4). He was represented before the Court by Mr T. Hassan, a lawyer practising in Zürich.

A. The circumstances of the case

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

3. The applicant entered Switzerland illegally on 29 April 2012 and applied for asylum the next day. He was heard in person twice by the Swiss authorities responsible for asylum and migration (until 31 December 2014 the *Bundesamt für Migration*, renamed with effect from 1 January 2015 as the *Staatssekretariat für Migration*, SEM – hereafter "the State Secretariat for Migration"). During both hearings an interpreter was present and the record was translated for the applicant prior to his signing it.

4. The first hearing was a summary interview on 7 May 2012. The applicant stated that he had dropped out of school in tenth grade to become a sportsman and that he had been drafted into the military and assigned to the S. military training camp in 1996. He had served in the Eritrean-Ethiopian war in three different places. In 2001 he had been reassigned to K., where he had remained until his departure in September 2011. He had twice been imprisoned for disobeying military orders, from May to November 2001 because he had refused to train to become a professional soldier, and from 12 December 2002 onwards for a period of one and a half years because he had gone to the military hospital for an appointment rather than attending training, without making a formal request to be absent. He also had his salary cut a number of times and his freedom of movement restricted after his imprisonment. He stated that he felt that he could not decide on matters of his own life during military service and that the duration of the service was too long. Therefore, he had decided to flee. After ten days' holiday in Asmara, he had returned to K. on 5 September 2011. On 9 September 2011, at around 5.30 pm, he had left K. on foot with two fellow soldiers called N. and S. They had walked through the night to G. and then rested in a riverbed during the day, before continuing to Kassala, Sudan, where they had arrived at around 6 p.m. From there he had travelled to Khartoum and subsequently to Europe by airplane, with the help of a smuggler. In order to support his account, the applicant submitted copies of his identity card and of his birth certificate, the latter issued in Asmara on 24 March 2011.

5. The second, more detailed hearing took place on 23 September 2014. A member of a non-governmental organisation was present as a neutral witness, in order to guarantee the fairness of the hearing. He had the opportunity to add comments at the end of the record of the hearing in the event that he had witnessed any irregularities, but did not make any such observations.

6. The applicant stated that, during his first period of imprisonment in 2001, he had repeatedly been beaten all over his body and for a month had been forced to stay in the sun for two hours every day with his hands tied. He had subsequently suffered from various health problems, including problems with his knees, which prevented him from walking far. He had not been subjected to ill-treatment after his second release from prison. He decided in 2010 to leave Eritrea because he could no longer bear military

service, which seemed endless to him. Due to the strict surveillance he was under, he did not carry out this plan right away.

7. When giving an account of the alleged events leading up to his escape, he stated that he had been granted a month's holiday, starting from 3 May 2011, in connection with his wedding. He had then extended his holiday for another three months without authorisation, until 4 September 2011, in order to obtain custody of his daughter from a previous relationship. After about two months, four persons from his military unit had gone looking for him at his house in Asmara, where they threatened his mother and sister. He had managed to hide with relatives because he had received advance information from friends about the search. When he learned from his friend G., who worked in the brigadier's office, that the authorities were to come to his house again to arrest him, he returned to the military unit in K. He submitted that he had hoped that he could avoid a prison sentence by returning voluntarily. He said that a salary cut for a period corresponding to that of the unauthorised absence was the usual punishment if soldiers returned voluntarily. When he learned from his friend G. that it had already been decided that he would be imprisoned, he stayed with his unit for another two days before leaving on foot with his fellow soldiers N. and Z. in the late afternoon of the third day, 10 September 2011. To avoid attracting attention, they had left separately, pretending to go to defecate outside the barracks, and then met up at an agreed location some fifteen minutes' walk away. Both he and N. knew the area and the placement of soldiers well, which enabled them to avoid being caught while walking towards G. and, subsequently, Kassala. On 15 June 2015 the applicant submitted seven pictures of himself as a footballer and eight pictures of himself in military uniform.

8. On 14 September 2015 the State Secretariat for Migration rejected the applicant's asylum request and, noting that there were no obstacles to his return to Eritrea, ordered his departure from Switzerland. It took into consideration that he claimed to have been imprisoned for disobedience twice between 2001 and 2004, that is, several years before his departure from Eritrea. It found that there was no sufficient causal link between the two events and that, consequently, the alleged imprisonment was not relevant for the assessment of the applicant's asylum claim.

9. The State Secretariat for Migration found that the remainder of the applicant's account was not credible. It pointed out that he had stated at the first hearing that he had been in Asmara for ten days' holiday before returning to his military unit in early September 2011. At the second hearing he had stated that he had stayed in Asmara for four months, from May to September 2011, having extended his leave in connection with his marriage in May 2011 without authorisation for another three months. His claim that he had returned voluntarily to his unit when he learned that the authorities were searching for him was not comprehensible. He had also made

contradictory statements concerning the punishment at issue following the return to the military unit. In addition, he had initially stated that the only problems he had encountered since being released from prison in 2004 had been occasional cuts to his salary. His subsequent statement, that he feared being imprisoned in September 2011, was not credible. As regards his alleged illegal exit, the State Secretariat for Migration noted that he had claimed to have walked from K. to Kassala in one day and to have rested in a river bed during the day to avoid being caught by the authorities. As the distance between the two places was about one hundred kilometres, and he had previously claimed to have problems with his knees which prevented him from walking far, it deemed this account not to be credible.

10. On 16 October 2015 the applicant lodged an appeal against that decision before the Federal Administrative Court. He submitted that his imprisonment between 2001 and 2004 was relevant to his asylum claim and had to be assessed. Disobeying military orders had caused him to be considered as an enemy to the regime ever since. He had considered fleeing earlier, but had refrained from putting his plan into practice because of strict surveillance by the authorities. When he risked being imprisoned again in 2011, he had fled. He submitted that he had stated, at both hearings, that he had been in Asmara until 4 or 5 September 2011 and had escaped from his military unit on 9 or 10 September 2011. The State Secretariat for Migration had not confronted him at the second hearing concerning the alleged discrepancy whereby, at the first summary hearing, he had said that he had been on holiday in Asmara for ten days only, the latter being the result of an apparent misunderstanding. He had plausibly explained his motivation for returning voluntarily to his military unit in K., notably that he had hoped for a less severe punishment in the form of a salary cut. He could not be blamed for having focused on explaining his earlier imprisonment rather than the risk of renewed imprisonment in 2011 during the first summary hearing, as he had been told that he would be heard more thoroughly later on. His descriptions of his flight route had been consistent. It had taken him three days, not one, to travel from K. to Kassala. However, the State Secretariat for Migration had failed to confront him with this alleged discrepancy during the second interview, asking him only about the border crossing. As a simple soldier who had previously been imprisoned, he stood no chance of obtaining an exit visa. Furthermore, he had health problems and could no longer rely on a family network in Eritrea as his father had died in the meantime. The fact that he had sought asylum and had been absent from Eritrea for years further increased his risk of ill-treatment.

11. On 4 September 2015, the State Secretariat for Migration provided a written statement to the Federal Administrative Court, explaining that references to the applicant's claim relating to his recruitment, his service in the war between Eritrea and Ethiopia and photographs showing the applicant as a young man in military uniform, had been omitted from its

decision of 14 September 2015 because the said events had occurred several years prior to the applicant's departure from Eritrea in 2011. These aspects and documents could thus not support the applicant's claim as to the reason for and circumstances of his departure. In another statement of 11 April 2016 the State Secretariat for Migration acknowledged that it was credible that the applicant had, a long time before, had contact with the military authorities. However, it could not be concluded from this that he had deserted, as he might have been released from military service on health or other grounds. It had to be borne in mind that several thousands of soldiers had been demobilised after the end of the war between Eritrea and Ethiopia.

12. On 15 June 2016 the Federal Administrative Court rejected the applicant's appeal. It noted that the State Secretariat for Migration had thoroughly reasoned why the majority of the applicant's statements were contradictory and had correctly applied the standards for assessing his credibility. The appeal submission had failed to indicate the reason for the alleged unlawfulness of the State Secretariat's evidentiary assessment, which the court endorsed, including with regard to the photographs showing the applicant in military uniform. The court also considered that the applicant had failed to demonstrate credibly his alleged illegal exit from Eritrea. His statements regarding the days he had spent with his military unit prior to escaping, the preparations and the escape itself lacked detail. He was unable to describe the location where he had agreed to meet with his two fellow soldiers. He was also unable to specify the costs of his air travel from Sudan to Europe, borne by his relatives in Saudi Arabia, or to say with which airline or papers he had travelled to Italy. He could legitimately have been expected to provide a substantiated account of his alleged illegal exit if he had indeed experienced it. Finally, the court added that Eritrean nationals who had left their country illegally could avoid the risk of being subjected to treatment contrary to Article 3 of the Convention by paying a small diaspora tax. It found that there were neither general obstacles to returns to Eritrea, such as war or general violence, nor individual ones, as the applicant still had intact family relations in Eritrea, where his wife, parents and sister lived. He also had relatives living abroad with some financial resources who, he submitted, had previously supported him by paying for his journey from Sudan to Europe.

13. On 23 June 2016 the State Secretariat for Migration set a deadline for the applicant's voluntary departure, which passed on 21 July 2016.

14. On 18 July 2016 the applicant lodged a request for re-examination with the State Secretariat for Migration. He argued that he could present new evidence as he had managed to find soldiers who had served in the same military unit as he had, all of whom had been granted refugee status in Switzerland and would be willing to testify concerning his military service and imprisonment. This way he could prove, or credibly demonstrate, that

he was at risk of ill-treatment in Eritrea on account of his desertion and illegal exit. He also submitted a death certificate in respect of his father.

15. On 12 October 2016 the State Secretariat for Migration dismissed the request as inadmissible for lack of competency. Observing that the applicant had not relied on a change in circumstances in Eritrea or new grounds that had not existed at the time of the Federal Administrative Court's judgment of 15 June 2016, it concluded that the request did not constitute a request for re-examination or a subsequent asylum application within its competence. It noted that the request could be considered as a "qualified" request for re-examination within the Federal Administrative Court's competence and that the applicant could turn to that court if he wished to pursue such a request.

B. Relevant domestic law and practice

16. The relevant domestic law and practice has been summarised in *M.O. v. Switzerland* (no. 41282/16, §§ 34-35, 20 June 2017).

C. Relevant country information on Eritrea

17. The relevant country information on Eritrea has recently been summarised in *M.O. v. Switzerland*, cited above, §§ 36-53. No reports about events and developments indicating a significant change in the situation have been published since the delivery of that judgment on 20 June 2017.

COMPLAINTS

18. The applicant complained that he would face a real risk of being subjected to treatment in breach of Articles 3 and 4 of the Convention if he were deported to Eritrea.

THE LAW

A. Alleged violation of Article 3 of the Convention

19. The applicant complained that he would face a real risk of being subjected to treatment in breach of Article 3 of the Convention on account of his desertion and his illegal exit if he were deported to Eritrea. Article 3 of the Convention reads:

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

20. He submitted that he would be arrested immediately at the airport in Asmara if he were deported to Eritrea, as he had left the country illegally while being eligible for military service and had neither a passport nor an exit visa. He would then face arbitrary detention, torture, and arbitrary and inhumane punishment at the hands of either the secret service or the police owing to his desertion and illegal exit. Afterwards he would be returned to the commander of his military unit, who might also punish him arbitrarily.

21. The applicant asserted that his account as presented to the Swiss authorities was consistent and credible. He had provided satisfactory explanations for the alleged discrepancies, emphasising that the State Secretariat for Migration had failed to confront him with these at the second hearing which had taken place 28 months after the first summary hearing. There were no strong reasons to question the veracity of his account, in support of which he had provided sufficient evidence, and he was to be given the benefit of the doubt. With regard to his recruitment, the performance of his military service, his two periods of imprisonment, his last stay in Asmara, his desertion and his flight, he mainly repeated the submissions he had made in his appeal to the Federal Administrative Court. He claimed that that court had not taken into account all aspects of his submissions, in particular that the State Secretariat for Migration had subsequently acknowledged that he had served in the military, and had failed to consider that his flight was causally linked to the ill-treatment he had suffered in the past.

22. His birth certificate, issued in Asmara in March 2011, proved that he had lived in Eritrea at that time. It was impossible for him to provide additional evidence to confirm his illegal exit. He was a simple soldier and in light of his age eligible for military service, not in need of medical treatment abroad, poorly educated and thus unable to get a scholarship abroad, and neither a businessman nor a sportsman. Consequently, it had been impossible for him to obtain the exit visa required for a lawful exit. He had, therefore, proved or at least established prima facie, that he had exited Eritrea illegally. He could not reconcile with the Eritrean authorities by paying a 2% diaspora tax and signing a letter of regret. Finally, being a failed asylum-seeker was in itself sufficient to put him at risk.

23. The relevant general principles concerning the application of Article 3 of the Convention have recently been summarised by the Court in *J.K. and Others v. Sweden* [GC] (no. 59166/12, §§ 77-105, ECHR 2016).

24. In accordance with the Court's established case-law, the existence of a risk of ill-treatment 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 expulsion (see *F.G. v. Sweden* [GC], no. 43611/11, § 115, ECHR 2016). However, if the applicant has not yet been deported

when the Court examines the case, the relevant time will be that of the proceedings before the Court (*Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008). Since the applicant has not yet been deported, the question of whether he would face a real risk of persecution upon his return to Eritrea must be examined in the light of the present-day situation.

25. The Court noted in *M.O. v. Switzerland* (cited above) that the human rights situation in Eritrea was of grave concern and that people of various profiles were at risk of serious human rights violations (ibid., § 70). Nonetheless, it found that the general human rights situation in Eritrea was not such that it prevented, *per se*, all deportations to Eritrea and that the Court, hence, had to assess whether the applicant's personal circumstances were such that he or she would face a real risk of treatment contrary to Article 3 of the Convention if deported to Eritrea (ibid., §§ 70-71).

26. The Court observes that the applicant submitted that he was at risk of ill-treatment owing to his desertion from military service and his illegal exit from Eritrea, that the Swiss authorities had dismissed his account as not credible, and that the applicant did not submit direct documentary evidence relating to a real risk of ill-treatment which he would face in Eritrea. In relation to all of these aspects, the present case bears similarities to that of *M.O. v. Switzerland* (cited above).

27. The Court reiterates that, as a general principle, the national authorities are best placed to assess the credibility of an individual, since it is they who have had an opportunity to see, hear and assess his or her demeanour (see, for example, *F.G. v. Sweden*, cited above, § 118). It notes that the State Secretariat for Migration and the Federal Administrative Court found that there were several discrepancies and credibility concerns in relation to the applicant's account, notably with regard to his last stay in Asmara, his voluntary return to his military unit in K., the punishment he feared there and the circumstances of his escape (see paragraphs 9 and 12 above). The discrepancies and credibility concerns thus related to core aspects of the applicant's claim and his account as a whole (similar to *M.O. v. Switzerland*, cited above, § 75). In so far as the applicant alleged that he had suffered ill-treatment in the past, the Court observes that for such ill-treatment to provide a strong indication of future ill-treatment, the applicant has to provide a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue (*J.K. and Others v. Sweden*, cited above, § 102).

28. The Court notes that the applicant referred to the requirement to obtain an exit visa in order to leave Eritrea legally and submitted that it had been impossible for him to obtain the exit visa required for lawful exit, given his age, health, level of education, and lack of involvement in business or sports. He argued that the illegal exit of a person eligible for military service was sufficient for that person to be perceived as a deserter

and to face ill-treatment upon a forced return to Eritrea. He relied on his birth certificate, issued in Asmara in March 2011, to support his claim that he had been living in Eritrea until his departure, and added that it was impossible for him to provide additional evidence to confirm his illegal exit.

29. In *M.O. v. Switzerland* (cited above), the Court considered that, in circumstances such as those claimed by the applicant, it was impossible to confirm an illegal exit from Eritrea by way of documentary evidence and that, therefore, decisive weight was to be attached to the plausibility of the applicant's testimony (ibid., § 77). The Court notes that his account appears plausible in the light of the country information on Eritrea. However, it also notes that the State Secretariat for Migration, which heard the applicant in person twice, and the Federal Administrative Court pointed to a number of discrepancies and a lack of substance and detail in various parts of the applicant's account, including in relation to his departure from Eritrea and other key elements of his claim. They both gave thorough reasons why they did not consider credible the applicant's account in relation to his alleged illegal exit (see paragraphs 9 and 12 above). The Court reiterates that it found in *M.O. v. Switzerland* (cited above) that a person whose asylum claim had not been found credible could not be assumed to have left Eritrea illegally, and that being a failed asylum-seeker was not in itself sufficient for a person to face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon his or her removal to Eritrea (ibid., § 79).

30. Having regard to the above, and reiterating that the Convention system is founded on the principle of subsidiarity, and that it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts, which are, as a general principle, best placed to assess the evidence before them, the Court is satisfied that the assessment made by the domestic authorities was adequate, sufficiently reasoned, and supported by material originating from reliable and objective sources (see *F.G. v. Sweden*, cited above, § 117). It sees no reason to depart from the assessment by the Swiss authorities that the applicant failed to substantiate that he would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if forced to return to Eritrea.

31. It follows from the above that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 4 of the Convention

32. The applicant alleged that he would risk being subjected to treatment in breach of Article 4 of the Convention if he were deported to Eritrea. He claimed that he would be sent back to his military unit and forced to carry out indefinite military service which, in its current state, would violate his right not to be held as a slave or in servitude and not to be required to

perform forced labour. As regards the different human rights violations in the military or national service in Eritrea he referred to, *inter alia*, the reports of the UN Commission of Inquiry on Human Rights in Eritrea published in 2015 and 2016.

33. The Court notes that the applicant's claim as presented to the State Secretariat for Migration and the Federal Administrative Court focused on the risk that he would face ill-treatment if he were deported to Eritrea, for reasons of his alleged desertion from the military and his illegal exit. It is true that he had also stated in the domestic proceedings that he could no longer bear military service, which seemed endless to him, and had therefore decided to leave the country illegally (see paragraphs 4 and 6 above). However, the Court considers that, in the set of proceedings leading to the present application, the description of the applicant's fear of being sent back to his military unit and being forced to carry out indefinite military service was primarily relevant to the description of the circumstances of the applicant's departure from Eritrea, and not as relevant to the dangers to which he would be exposed if he were forcibly returned (similar to *M.O. v. Switzerland*, cited above, § 89). The applicant did not argue before the domestic authorities that military service constituted slavery, servitude and/or forced labour and the domestic authorities did not examine this aspect.

34. The Court reiterates that, under Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, the purpose being to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010). While Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it normally requires that the complaints intended to be brought subsequently before the Court should have been made to the competent domestic courts, at least in substance (ibid.; see also *Association Les témoins de Jéhovah v. France* (dec.), no. 8916/05, 21 September 2010).

35. In view of the foregoing considerations, the Court finds that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

36. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 December 2017.

Fatoş Aracı
Deputy Registrar

Pere Pastor Vilanova
President