

October 2019

Appendix 2 for CERD: Violations of CERD: Article 5

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Handling Asylum Requests of Sudanese Nationals

This section details the chronological events and the repercussions of the State's actions. Direct quotations are indicated by quotation marks and bold font.

This chapter describes the Israeli government's ongoing efforts to prevent Israeli courts from compelling it to act in accordance with Israeli law as regards management of asylum requests by asylum seekers from the Darfur, Blue Nile and Nubba regions.

For many years, the government has dragged out court proceedings, as detailed below, in order to prevent the courts from handing down decisions that would force the Ministry of Interior (MoI) to grant status to Sudanese and Eritreans as required by International law.

Chain of Events

1. Beginning in 2013, the MoI began accepting asylum requests from asylum seekers from Eritrea and the Darfur and Nubba regions of Sudan. However, the Ministry simply filed these requests away, without taking action on them.

In 2014, individual asylum seekers began appealing to various courts, demanding that the Ministry make a decision on their requests. The courts repeatedly gave the MoI opportunities to do this, but it delayed, requesting extensions, creating new policies, forming investigating committees, etc., using the courts as a smokescreen for its deliberate inaction (a situation which continues to this day).

2. Frustrated by the Ministry's inaction, the courts began granting temporary residence (A5 permits) or work permits (B1 permits) to individual petitioners, pending the MoI's final decision on their status. On one occasion the Court of Appeals stated that "**... the actions of the Authority... constitute a significant flaw in proceedings requiring intervention by the court.**"

It is important to note that the A5 permit provides social benefits (such as national health insurance), enables the holder to leave and return to Israel, and exempts the holder from the Deposit regulation which places 20% of a person's salary in a holding account until they leave Israel.

3. In June 2017, in response to pressure from the courts, the Mol granted 200 A5 permits to a group of Sudanese from the Darfur region who met specific age and entry date criteria.

In December 2017, 300 more Sudanese from the Darfur region received the same permits under similar conditions.

In May 2018, 300 more Sudanese from Darfur, as well as the Nuba Mountains and the Blue Nile regions, received the same permits under similar conditions.

4. In 2018 the Mol began to appeal the issuance of these permits in district courts. On 26 November 2018, Judge Darel (District Court of Jerusalem) ruled in the Ministry's favor, effectively reversing the A5 permits. An appeal, still pending, was submitted to the HCJ.

On 27 May, 2019, Judge Vinograd (District Court of Jerusalem) also ruled in favor of the government, reversing the A5 permits issued as a temporary measure until the Mol makes a decision regarding asylum requests.

5. On 19 March, 2019, the High Court of Justice issued an injunction in 2 main appeals submitted on behalf of Darfuri and Nubba region asylum seekers by private attorneys, (HCJ 7552/17 and HCJ 4630/17), in which the Immigration Authority was required to explain why A5 permits should not be granted to the plaintiffs and other asylum seekers until a final decision is made about their asylum requests.

The injunction required the government to explain why it had not immediately adopted "... **the guidelines [to examine and decide] on asylum requests ..., and instruct the Advisory Committee on Refugees to take action on these requests accordingly,**" or alternately, to explain "... **why it does not immediately declare these guidelines to be unnecessary, and instruct the Advisory Committee to take action ... accordingly.**"

6. In wake of these injunctions, the government decided that all asylum seekers from Darfur, Nubba and Blue Nile regions would receive a 2A5 permit for 1 year until their asylum request is determined. In a meeting headed by the Prime Minister on 4 July, 2019, the government decided to remove the phrase "This permit is not a work

permit" from permits issued to asylum seekers from Eritrea and the Darfur and Nubba regions. It also decided to issue B1 permits to 300 asylum seekers from these regions by 9 August, 2019.

The government also included a detailed assessment by the Israeli Ministry of Foreign Affairs which described the spiraling instability in Sudan, the ouster of Sudan's president Amar El Bashir by the military, and the iron fist response of this military and its auxiliary militias to mass protests, with the political and governmental uncertainty spreading to the country's periphery. The assessment also mentioned reports from the media and UN entities detailing hundreds of deaths in the suppression of the civil revolt, as well as horrific acts of rape and concealment of bodies, with most of the accusations levied against the same militia accused of war crimes against African tribes in the Darfur region in previous years.

The government's response continued: **"Given these circumstances, it [is] difficult to move forward on individual asylum requests because there is no clear picture of the situation in Sudan. This uncertainty ... and its impact on the [asylum request process] prevents the government from formulating guidelines for individual asylum requests from the Sudanese...**

"Therefore, until the picture becomes clear, the MoI has decided that it cannot determine individual Sudanese asylum requests at this time; and that... the RSD unit [should] now focus on asylum requests submitted by Eritreans [for whom] guidelines for asylum requests from Eritreans have already been formulated."

7. In 2019, 14 asylum seekers who received A5 permits by the courts (3 of whom had their permits revoked by the Ministry as a result of Judge Darel's ruling), appealed to the High Court of Justice (HCJ 4331/19). All other government appeals were frozen, waiting for precedential rulings by the HCJ on the two cases pending since 2017 (HCJ 7552/17 and HCJ 4630/17).

Ruling by the High Court of Justice, 9 July, 2019 (HCJ 4331/19)¹

8. In its decision on 9 July, 2019, the HCJ noted that the State had submitted 55 appeals, of which 40 were still pending. It seemed significant that though the RSD unit of the Population and Immigration Authority claimed it did not have the resources to review

¹ High Court of Justice: Honorable Justice A. Fogelman
Honorable Justice D. Barak-Erez
Honorable Justice G. Kara
Plaintiffs: Muhamad Isma'il Adam and 13 others
Defendant: State of Israel – The Population and Immigration Authority

asylum requests, the government had the time and resources to devote to stalling tactics in its efforts to delay implementation of court rulings.

The court noted that in a hearing before the High Court of Justice in 2017 (HCJ 4630/17) the attorney for the petitioners, Michal Pomerantz, objected to the government's request to extend the date of its response by 6 months, and stated that, in the end, the government was admitting that it was **"incapable of implementing, or does not want to implement...the HCJ's injunction now, or in the foreseeable future."** She concluded that **"...the only solution ... is to issue a final decision in HCJ 7552/17 and provide A5 permits to asylum seekers from the Darfur and Nubba regions until their asylum requests have been determined – whenever that happens."**

The HCJ's decision, written by Justice Fogelman, stated that the situation, in which the plaintiffs would keep their A5 permits until the MoI, which has the final word, decides on their asylum requests was not an irreversible situation, and that no harm would result from issuing the permits. **" We believe that the scales should be tipped in favor of the plaintiff in the current situation."**

Fogelman also wrote that: **"... in cases where asylum seekers have received A5 status as a result of a ruling by a court of appeals, no temporary injunction will be issued [against them] if the government appeals this decision to a District Court."**

Fogelman also revoked Judge Vinograd's ruling, and required the MoI to restore any A5 permits that were granted, and then later revoked, by that ruling. In the decision he also issued a warning to the Ministry to review the considerations of this ruling before it decided to submit additional appeals in similar circumstances.

The court instructed the government to hold hearings on the pending appeals during the first quarter of 2020, due to upcoming elections on 17 September 2019, , and that the draft of the government's response be submitted 45 days before the hearing. Fogelman also instructed the government to pay NIS 5,000 to each of the plaintiffs for legal expenses.

Another hearing at the HCJ is scheduled for December 9th.

Handling Asylum requests of Eritreans Nationals

According to the Government's reply to court, 16,149 Eritreans submitted asylum applications. 5,502 of these were rejected, 13 were recognized as refugees and 10,647 requests are still pending. In July 2019, the MOI announced that it would re-examine all asylum applications submitted by Eritreans, including those previously rejected. The applications are to be re-examined under new criteria which include a requirement for draft evasion or defection from the Eritrean army to have a "clear, distinct and prolonged ideological dimension" and are stricter than the criteria posed by UNHCR in similar cases. The State's refusal to reveal the new criteria makes it difficult for applicants to appeal rejections.

This chapter summarizes the Updated Message and Request by the State of Israel submitted to the District Court of Jerusalem on July 9, 2019. Actual quotations are indicated by quotation marks and bold font.

District Court of Jerusalem
Court of Administrative Affairs
The Honorable Justice Oded Shacham

State of Israel – the Population and Immigration Authority vs. Eritrean Citizen² Updated Message and Request by the State of Israel

In accordance with the Court's decisions, this updated message is submitted by the State, as well as a request as part of the State's appeal.

Reasons for the updated message and request:

1. On the recommendation of the State Attorney General, an advisory committee (hereafter: the Committee) was formed to define criteria to be applied to asylum requests by Eritrean asylum seekers (hereafter: the Criteria Document).
2. The criteria were sent to the Attorney General and approved by him and, in a subsequent meeting, were reviewed and approved by the head of the National Security Council and other relevant officials, and finally by the Minister of Interior.
3. The following version of the Criteria Document is for publication. Portions of the source document have been redacted because relevant officials believe that publication of these portions might cause the plaintiff to change his request to meet the new criteria. This does not mean that the plaintiff's request, as well as other asylum requests, will not be thoroughly examined according to these criteria. This position is acceptable to the Attorney General.

² Abraham Misgena

4. The criteria in this document will impact all requests for asylum by Eritrean asylum seekers.
5. At this time there are approximately 3,000³ asylum requests by Eritreans that have been rejected, as well as approximately 10,000 pending asylum requests. The criteria in the Criteria Document will be applied to all of these requests, including those previously rejected.
6. The Ministry of Interior (MoI) intends to change some of its policies as regards the Eritreans in Israel. In the first stage, the sentence "This permit is not a work permit" will be removed from the permits given to asylum seekers. In addition, the permits will be valid for six months, instead of the current two months period. Additional changes in policies might be made in the future.
7. The following paragraphs relate to this specific case [State of Israel vs. Abraham Misgena]:
8. Previous court rulings in this case, including appeals⁴, are no longer relevant because all asylum requests will be reviewed. The plaintiff's current status will continue to be valid until the MoI makes a final decision, following the review.
9. The Court is requested to review the Criteria Document and halt the current. At the same time, the MoI is requested to review all asylum requests according to the new criteria.⁵

³ According to the Hotline for Refugees and Migrants (HRM) there were originally about 5,000 requests for asylum by Eritreans, but about 2,000 have left the country.

⁴ HRM: Abraham Misgena's case was begun in 2014. The State's actions in this case delay a possible grant of asylum.

⁵ HRM: No deadline has been defined for completion of this review.

Criteria for the Examination of Asylum Requests by Eritreans on the Basis of Desertion or Draft Evasion from Military or National Service in Their Country

This document is for publication. It is a summary of the decisions made by the Committee. Note: so as not to impair the legal proceedings of the specific asylum request⁶, portions of this document have been redacted.

Background:

1. The Committee was asked to define criteria to determine the status for Eritreans requesting asylum on the basis of desertion and draft evasion.
2. The Court had ruled that "subjective evidence" shows that the Eritrean government views desertion and draft evasion as a political act which would lead to persecution by the government. The Court ruled that requiring the plaintiff to provide proof of personal persecution was too much to ask.
3. The Director of the Ministry of Interior (MoI) and the Minister of Interior determined, based on the ruling of April 21, 2013, that desertion and draft evasion **in themselves** are not evidence of [actual or potential] political persecution, but must be related to one of the [5] criteria listed in the UNHCR Refugee Convention.
4. A document listing the characteristics of asylum requests was given to the Committee. These characteristics, based on hundreds of interviews with Eritrean asylum seekers, fall into 3 categories: draft evasion, desertion and punishment.
5. Draft evasion [draft dodging]: The following are the claims raised by Eritrean asylum seekers as regards draft evasion:
 - a. Conditions of service
 - b. Prolonged service with no time limit
 - c. Women's' fear of sexual exploitation
 - d. Inability to complete one's studies
 - e. Limitations on freedom of movement
6. Desertion: The following are the claims raised by Eritrean asylum seekers as regards desertion:
 - a. Conditions of service and absence of consideration of personal needs, medical needs, family income and vacations
 - b. Disproportionate and arbitrary punishment
 - c. Drafting of married women

⁶ State of Israel vs. Abraham Misgena

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- d. Difficulty in expressing opinions to superiors, and being compelled to follow illegal orders
 - e. Assignment to positions that are personally unsatisfying
 - f. Being re-drafted after receiving a draft exemption
 - g. Fear of punishment or being re-drafted for abandoning one's weapon, holding a high rank, or possessing classified information
 - h. Being a conscientious objector
 - i. Discrimination based on particular characteristics, such as having Ethiopian origins
 - j. Imprisonment for aiding deserters or being in proximity to them; the demand for bail to be released from such imprisonment
 - k. Religious persecution for belonging to an unrecognized stream of Christianity, such as Pentecostals, Protestants and Jehovah's Witnesses
 - l. Expression of political views, or being accused of having political views against the regime; being accused of espionage or belonging to an outlawed opposition organization such as ELF, SMER, EYSNS and HIDRI
 - m. Evincing prohibited sexual tendencies
 - n. Economic reasons
 - o. Leaving Eritrea illegally
7. Punishment: The following are the claims raised by Eritrean asylum seekers as regards punishment for desertion or draft evasion:
- a. Punishing the offender with prolonged imprisonment, forced labor, withholding salary and loss of rights
 - b. Punishing family members with fines and confiscation of landed property

Discussion:

8. Eritrea has an undemocratic regime that abuses human rights. The implications of the peace agreement between Ethiopia and Eritrea are not yet clear.
9. In general, desertion or draft evasion from military or national service is a criminal or disciplinary [military] offense, [whose punishment], according to UNHCR, does not constitute political persecution. What is needed is to determine the existence of additional circumstances that might constitute persecution that meets the criteria specified in the Refugee Convention.
10. After examining the various claims, the Committee believes the existence of a "well-founded fear" of being persecuted in the country of origin must be identified. This fear, according to the Refugee Convention is based on 2 foundations: subjective (the sense of fear) and objective (fear based on something actual).

11. This Committee cannot accept the position that desertion or draft evasion in themselves constitute a viable fear of persecution; rather, there should be both subjective and objective evidence that the possibility of persecution exists.⁷
12. The plaintiff must persuade the court that his fear of persecution has an objective basis. His story must be credible, coherent and free of major contradictions. Then it can be determined whether the requisite, detailed criteria for a "well-founded fear" exists according to the Refugee Convention.
13. The Committee believes that in defining criteria for recognition of desertion or draft evasion in Eritrea as grounds for political persecution, a distinction must be made between draft evasion / desertion of an ideological or political nature (covered by the Refugee Convention) and draft evasion / desertion for other reasons which are not.
14. In general, the Committee believes that the following are grounds for recognizing desertion and draft evasion from military or national service as political persecution, in addition to individual circumstances that meet the criteria of the Refugee Convention:
 - a. There exist other reasons for political persecution, even if they are not completely covered by the Refugee Convention.
 - b. When evasion/desertion have a clear, concrete, continuous ideological dimension in which political persecution, as defined by the Refugee Convention, can be clearly seen.
15. The principles in the following list will be used to analyze asylum requests in which desertion or draft evasion is used to support the request, according to the particular circumstances of each, on the condition that the plaintiff, and his evidence, are credible, together with up-to-date information about the country of origin.
16. In addition, various details will be used to ascertain the authenticity of claims regarding political persecution due to desertion or evasion, for each asylum request.

This next section has been redacted by the Committee, and is therefore a summary:

It must be emphasized that the criteria determined by the Committee are not a "final list", and that the weight of each component will be determined by the Committee according to the specific circumstances of each asylum claim.

⁷ HRM: This position has been accepted by both the UK and Switzerland.

Note that these criteria apply to both men and women.

In the criteria determined by the Committee, 2 major categories were identified, the details of which might lead to refugee status:

17. [Category 1] Circumstances which do not themselves constitute a basis for asylum requests, but when added to claims of desertion or evasion, might bring about recognition as a refugee [...]

Paraphrased text: In this category, various circumstances will be considered which might reveal that the plaintiff suffered abuse in Eritrea for unique reasons, or where, for these reasons⁸, the plaintiff's rights were abrogated.

18. [Category 2] Circumstances which point to draft evasion or desertion with an ideological or political dimension in such a way as to result in recognition as a refugee. [...]

Paraphrased text: Circumstances will be considered where specific characteristics of the military or national service came to light, or actions were taken in the public sphere against the Eritrean regime while still in Eritrea.

19. The Committee, in the source Criteria Document, specified criteria of exceptional personal circumstances which might impact the general assessment of the asylum request because of their severity. [...]

Paraphrased text: The plaintiff's personal characteristics or exceptional circumstances regarding experiences in his country of origin will be considered, especially as regards his national or military service.

20. In addition, the Committee has included a list of indicators which could point to the absence of an ideological dimension to desertion or draft evasion. [...]

Paraphrased text: Circumstances will be taken into account that might weaken the plaintiff's assertion that desertion or evasion has an ideological dimension, due to the generalized aspect of the claims, or their lack of credibility, or the circumstances of his exit from the country, or his actions.

Continuation of the source Criteria Document, not redacted:

⁸ HRM: Perhaps transgender identity, etc.

21. "In summary, the Committee must take into account a range of criteria when reviewing claims of desertion and draft evasion, while simultaneously examining indications that the desertion/evasion has an ideological or political dimension, and is not a simple situation of desertion/evasion, and while examining the existence of additional circumstances of the desertion/evasion. Within this framework, the Committee must evaluate the credibility of the plaintiff's version and examine its evidence while taking into account the evidential threshold required in these situations.

In addition, the Committee must consider a range of other aspects of the request as a whole which might reduce the weight of the ideological dimensions of the plaintiff's actions. Note that this examination will be executed separately, without regard to separate aspects of the asylum request unrelated to desertion/draft evasion, and which in themselves constitute a claim of persecution according to the criteria in the Refugee Convention."

22. This analysis of the asylum request must be carried out openly, willingly, and completely, while making the crucial distinction between mere desertion / evasion of a country's legal obligation (even if this country is not a democracy and its punishments are cruel and unusual), and desertion / evasion that have certain ideological, religious or social dimensions.

Signed: Members of the Advisory Committee