

Alternative Report

On the discriminatory practice regarding Eritrean asylum seekers in Switzerland.

A. Introduction

On 13 March 2014, the Committee on the Elimination of Racial Discrimination (ComERD) published its Concluding Observations on the seventh to ninth periodical report of Switzerland.

The Committee noted *inter alia* the following:

- Serious concerns about the racist stereotypes propagated by members of populist parties and the extreme right-wing media targeting in particular asylum seekers, immigrants and people of African descent (para. 12).
- Serious concerns with respect to the situation of migrants and undocumented persons (*sans-papiers*) who are particularly exposed to poverty and violence and who are subject to multiples forms of discrimination notably concerning housing and work (para. 17).

Switzerland's lack of progress since the Committee's Concluding Observations of 2014 is striking. Of particular concern is the situation of Eritrean asylum seekers which has worsened dramatically in the wake of the Swiss migration authorities' radical change of practice in 2017 - 2019. As we explain further below, this change of practice implemented by both the State Secretariat for Migration (SEM) and the Federal Administrative Court (FAC) targets specifically Eritrean asylum seekers denying them protection from *non-refoulement* for which they qualify under international law. Further, Eritrean nationals already legally residing in Switzerland have their residence authorization withdrawn under the new policies, leaving them in legal limbo since expulsions to Eritrea cannot be executed.

The aim of this shadow report is to highlight the above practice which is driven by racial discrimination and which ultimately exposes the persons concerned to the risk of torture, inhuman and degrading treatment or forced labor in Eritrea or a life without a recognized immigration status in Switzerland (*débouté*) depriving them of their human dignity.¹

¹ Our shadow report focusses on this particular aspect of racial discrimination in Switzerland. This does in no way mean that no other practices of racial discrimination do exist in Switzerland, but reflects only the specialization of our organization.

B. Political Context

1. The current situation of Eritrean asylum seekers in Switzerland finds its roots in domestic political developments going back over a decade.
2. In 2005, the former Swiss Asylum Appeal Commission examined the situation in Eritrea and published a leading judgment holding that desertion from, and conscientious objection to, Eritrean national service were relevant factors in determining the risk of persecution upon return to Eritrea, as all criteria of the Refugee convention were met. According to the Asylum Appeal Commission, deserters and conscientious objectors could therefore be eligible for a grant of refugee status in Switzerland.² Following this determination, the number of Eritreans granted refugee status increased and Eritrea became the most significant country of origin of asylum seekers in Switzerland.³
3. This fact drew the attention of several political parties in Switzerland, most notably the *Schweizerische Volkspartei* (SVP),⁴ a right-wing and anti-immigration party that has consistently been one of the biggest parties in the Swiss Federal Assembly (the Parliament) holding important ministerial positions in the Federal Council (the Executive).
4. In 2007, the Minister of Justice, Mr. Christoph Blocher a member of the SVP, described the arrival of asylum seekers from Eritrea as the main problem of the Swiss asylum system. He announced that rigorous measures to fight against it would be examined by the government.⁵ He initiated a political debate targeting Eritreans specifically.⁶
5. In 2007 and 2008, a representative of the SVP submitted two Parliamentary “interpellations” concerning Eritrea. The submission of interpellations is a process by which legislators submit questions to government requiring usually an explanation of the executive’s policies and practices in a particular domain. In both of SVP’s *interpellations*, the increase in numbers of asylum claims of persons of Eritrean descent was presented as a significant problem. In particular, it was described as a ‘frightening development’ (“*erschreckende Entwicklung*”) resulting in an ‘abuse of the asylum system’ which has ‘caused high costs for the state’ and ‘has to be stopped’. The *interpellations* demanded that the Swiss government exclude desertion and conscientious objection as legitimate bases for granting asylum.⁷

² JICRA 2006/3 from 20 December 2005

³ State Secretariate for Migration (SEM), Asylgesuche nach Nationen (1986 bis 2019), in: <https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/uebersichten/gesuche-nation-ab-1986-d.xlsx>.

⁴ In French, the *Union Democratique du Centre* (UDC).

⁵ Swissinfo, Blocher prüft schärfere Massnahmen im Asylwesen, 02.02.2007, in: <https://www.swissinfo.ch/ger/blocher-prueft-schaerfere-massnahmen-im-asylwesen/5705112>.

⁶ Wochenzeitung, Jahrzehnt der Schikanen, No. 15/2018 of 12.04.2018, in: <https://www.woz.ch/1815/asylpolitik/jahrzehnt-der-schikanen>.

⁷ Hutter-Hutter Jasmin, Interpellation, 07.3178, Massive Zunahme der Asylgesuche aus Eritrea (massive increase of asylum claims from Eritrea), submitted on 22.03.2007; Hutter-Hutter Jasmin, Interpellation, 08.3353, Wie weiter mit den Massen asylgesuchen aus Eritrea? (How to move forward with the mass of asylum claims from Eritrea?), submitted on 12.06.2008.

6. Subsequently, the SVP placed the question of Eritrean refugees at the center of its political campaign promoting a more restrictive asylum policy. Other parties added their voice to the SVP discourse on Eritreans.⁸ Between 2014 and today, more than 100 parliamentary initiatives (*motions, postulates, interpellations and questions*) were submitted,⁹ the majority of them questioning the need for international protection for Eritreans or even going as far as to ask for expulsions to Eritrea to be executed.¹⁰
7. Since the above developments, the anti-Eritrean rhetoric of center and right wing parties especially of the SVP, has continued. This fact is clearly illustrated by a SVP campaign video which was broadcast in the context of the parliamentary elections of October 2019. The SVP video announces that “the asylum chaos of Eritreans destroys our [the Swiss people’s] security”. This message is followed by text in black letters including “knife fight”, “rape”, “violence”, “social abuse”, and “criminality” – with as a background, the red and white Swiss flag splattered with blood and the soundtrack of a crime series. In order to illustrate the message, the video further shows a certain number of headlines (designed as if they were peeled off a newspaper, but all of them show exactly the same design). Accompanied by an increasingly dramatic soundtrack, the video then shows the absolute and relative numbers of welfare recipients over time, comparing 2006 and 2016. It goes on to state that Eritreans are “not real refugees”, referring to the case law of the Federal Administrative Court. According to the video, Eritrean abuse of the asylum system is the reason for the existence of a deficit in the state budget in billions of Swiss Francs that will lead to massive tax increase. Finally, one hears that “Only the SVP is fighting to stop the admission of Eritrean “bogus refugees” – a good reason to vote for SVP on 20 October 2019.
8. YouTube considers this campaign video to constitute «hate speech» and has blocked it. The *Eritreische Medienbund Schweiz*,¹¹ a civil society organization, has brought a criminal complaint for racial discrimination against SVP under art. 261bis Criminal Code in October 2019. According to the *Eritreischen Medienbund Schweiz*, Eritreans are presented in this video as criminals and abusers of the welfare system, it employs incorrect figures and generalizes from individual cases. The complainant claims, amongst other things, that the bad and unjustified image of Eritreans that the SVP is spreading – based on false and unproven information – has discriminating effects on their chances on labor and housing market as well as on their integration, and that it stokes verbal and even physical attacks for racist reasons. The legal proceedings against SVP is still ongoing.¹²

⁸ Mathis Schnell, Eritreer*innen in der Schweiz: Chronologie einer Debatte, Data-driven journalism @ IPZ/UZH, 27.04.2018, in: <https://pwiweb.uzh.ch/wordpress/blog/2018/04/27/blog-eritrea/>. See notably diagram with development of media releases of the different actors over time.

⁹ Humanrights.ch, Die Luft für Asylsuchende aus Eritrea wird zunehmend dünner, in: <https://www.humanrights.ch/de/menschenrechte-schweiz/inneres/asyl/politik/ueberpruefung-asylsuchende-eritrea>.

¹⁰ ODAE romand, «Durcissement à l’encontre des Erythréen-ne-s : une communauté sous pression », November 2018, www.oda-romand.ch.

¹¹ <https://eritreischer-medienbund.ch/wordpress/>

¹² Nau.ch, SVP wegen Wahlkampf-Video angezeigt, 15. Oktober 2019, in: <https://www.nau.ch/politik/bundeshaus/svp-wegen-wahlkampf-video-angezeigt-65598901>. Youtube considers this video as «hate speech» and blocked it.

C. Consequences

1.1 Legislative consequences

9. The political campaign against Eritreans led by multiple political actors, especially the SVP, has had important legislative consequences. From 2009 onwards, the focus on limiting the number Eritrean asylum seekers coming to Switzerland reflected in the significant legislative activity concerning Eritrean asylum claims. This can be clearly demonstrated in at least two ways: the reservations to the Refugee Convention reflected in modifications to the Swiss asylum Act (AA) and the travel ban for refugees.

1.1.1 Reservations to Refugee Convention within the Swiss asylum Act

10. The Report of the Federal Council on the Modification of the Asylum Act from May 2010 shows that the proposed modification of Art. 3 (3) AA has to be seen as the consequence of the decision of the former Swiss Asylum Appeal Commission cited above as well as the political pressure that built up in reaction to it.¹³ In 2012, parliament decided to introduce a new paragraph 3 to article 3 AA, better known to as the “*lex Eritrea*”.¹⁴ This provision, that entered into force on 28 September 2012 and which was later confirmed by a popular vote, states the following:

Persons who are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages because they have refused to perform military service or have deserted are not refugees. The provisions of the Convention of 28 July 1951 relating to the Status of Refugees are reserved.

11. Although the wording of *lex Eritrea* aims to exclude those who refuse to perform military service, or desert, from the definition of refugee, it also confirms that “the provisions of the Convention of 28 July 1951 relating to the Status of Refugees **are reserved**” (i.e. meaning *without prejudice* to the 1951 Refugee Convention). In principle, judicial authorities in Switzerland continue to be bound by the Refugee Convention, i.e. they must assess each case individually to determine eligibility and must grant refugee protection if the convention criteria are fulfilled. It therefore remains possible for an individual to succeed in obtaining refugee status on the basis of refusal to perform military service or desertion, notwithstanding the wording of the *lex Eritrea*. The FAC has confirmed this in a precedent decision concerning a Syrian deserter holding that if a person has a well-founded fear of persecution within the meaning of the Refugee Convention because of desertion (or conscientious objection), they must still be recognized as a refugee, despite the wording of the *lex Eritrea*.¹⁵

¹³ Federal Council, *Message on the modification of the Asylum Law*, 26 May 2010, BBl 2010 4455, 4467.

¹⁴ Amnesty International, *Érythré : Recrutement forcé pour le service national*, dans : <https://www.amnesty.ch/fr/sur-amnesty/publications/magazine-amnesty/2012-70/erythree-recrutement-force-pour-le-service-national>.

¹⁵ BVGE 2015/3, recital 4.3-4.5 and 5.

12. The above analysis shows that in reality, the new paragraph 3 to article 3 AA has primarily symbolic and dissuasive value. It reflects the political agenda of the powerful actors who dominate the public and parliamentary debates in Switzerland. Importantly, it reflects the manifestly discriminatory intent of Swiss policy makers.

1.1.2 Travel ban for refugees

13. Art. 1 C to the Refugee Convention exhaustively lists the grounds for exclusion from refugee status. The only ground linked to travel is when a person voluntarily re-availed himself of the protection of the country of his nationality (1).

14. Nevertheless, the Swiss legislator decided to modify the Foreign Nationals and Integration Act (FNIA) by introducing the possibility of forbidding refugees also from travelling to countries *other than the country of origin* (specially to neighboring countries of the country of origin) if there exists a *well-founded suspicion* that the travel ban to the country of origin could be disregarded (new article 59c FNIA).¹⁶

15. The new article 59c FNIA, that will come into force on 1 April 2019, is clearly contrary to international law (see above, §12), is not formulated in sufficiently clear terms and violates the principle of proportionality. Other than these serious shortcomings, the new article 59c FNIA is an example of the political focus on Eritrean asylum seekers as the central reason for a restrictive asylum system. For example, Syrian refugees are not mentioned by proponents of the travel ban in the debates leading up to the modification of the law, even though their situation is similar in that many Syrian nationals have taken refuge or are stuck in countries neighboring Syria (see further below).

16. In fact, the Federal Council deleted the article from the bill after it received critical feedback.¹⁷ Nevertheless, the Parliament decided to reintegrate the extension of the travel ban.

17. The discussions of the Parliament on this question clearly show that this decision has been focused on Eritrean refugees. Just as the FAC in its lead judgments, the arguments in the Parliament leading to the (re-)introduction of the travel ban to neighboring countries were based on the unfounded idea that large numbers of Eritrean refugees would travel back to Eritrea for leisure, passing through neighboring countries in order to circumvent the prohibition of returning to the home

¹⁶ Art. 59c Travel ban for refugees FNIA

1 Refugees are not authorized to travel to their country of origin. If there exists a well-founded suspicion that the travel ban to the country of origin could be disregarded, the SEM can introduce a travel ban on other states for all refugees of the country of origin in question, especially for neighboring countries of the country of origin

2 The SEM can authorize a person to travel to a country on which a travel ban according to para. 1 2nd phrase exists, if there are important reasons [for travelling].

(AIG, Änderung vom 14. Dezember 2018, <https://www.admin.ch/opc/de/official-compilation/2019/1413.pdf>).

¹⁷ Federal Council, Botschaft zur Revision des Ausländergesetzes (AuG) (Verfahrensnormen und Informationssysteme), 2 March 2018, p. 13.

country.¹⁸ Even if the “suspicion” that Eritrean refugees are abusing the system has never been documented, this objectively baseless argument was sufficient for the Swiss parliament to adopt a rule violating international law, and in direct contradiction with the position adopted by the Federal council.

18. It is not coincidental that Eritrea was the only country mentioned in the parliamentary discussions militating in favor of the travel ban.¹⁹ All the more so as an analysis of the of revocation of refugee status on the basis that the refugee has availed themselves of the protection of their own country, show that very few Eritreans are concerned, and that this was far more often the case of citizens of other countries.²⁰
19. The focus led on Eritreans appears even more problematic, as the simple fact that numerous Eritreans – amongst them family members of Eritrean refugees staying in Switzerland – are living in refugee camps in neighboring countries of Eritrea such as Sudan and Ethiopia allows to explain why many Eritreans are travelling (or would like to travel) to neighboring countries of their home country. Eritrean refugees will therefore be especially affected by the travel ban.²¹
20. Journeys of Eritrean refugees in themselves cannot justify a “well-founded suspicion” of abuse of the system as required under art. 59c FNIA as long as a return to the country of origin has not been proven and there is not even a concrete evidence for such a return.
21. For now, the list of countries concerned by this article has not been established, but one can assume with confidence that the list will include a travel ban for Eritrean refugees to countries neighboring Eritrea. Against the backdrop of the genesis of art. 59c FNIA and as Eritrean refugees are especially affected by it, the introduction of the travel ban coming into force on 1 of April 2020.²² can be considered to a certain extent as a discriminatory measure targeting mainly Eritrean refugees for racist reasons.

1.2 Decision making and jurisprudence of the Federal Administrative Court (FAC)

22. Nevertheless, the political pressure targeting Eritrean asylum seekers has had an important impact not only on Swiss asylum legislation, but also on administrative

¹⁸ See notably Conseil des Etats, Summer session 2018, 9th session, 11.06.18, 15h15, 18.026 ; Conseil national, Autumn session 2018, 15th session, 27.09.18, 08h00, 18.026.

¹⁹ Syria for example was mentioned only once in these discussions, as an argument against the travel ban, by the parliamentarian Mattea Meyer Conseil national, Autumn session 2018, 15th session, 27.09.18, 08h00, 18.026).

²⁰ As mentioned by the parliamentarian Mattea Meyer during the discussion, only 4 out of 231 cases of revocation of asylum (and refugee status) concerned Eritrean refugees (Conseil national, Autumn session 2018, 15th session, 27.09.18, 08h00, 18.026).

²¹ The same is true for Syrian refugees in Switzerland for example, as many Syrian refugees are living in neighbouring countries such as Lebanon, Turkey or Jordan. Nevertheless, they have not been mentioned within the parliamentary discussions in order to put forward arguments in favour of the travel ban.

²² Federal Council, Inkrafttreten von Gesetzes- und Verordnungsänderungen im Migrationsbereich, press release from 19.02.2020.

decision making and the jurisprudence of the Federal Administrative Court (FAC),²³ as we show below.

1.2.1 Current position of the FAC

23. The current position on Eritrean asylum claims is set out in three judgments of the FAC – the final judicial instance in Swiss asylum procedure – between 2017 and 2018. With these decisions, the FAC followed the tightening of restrictions imposed by the State Secretariat for Migration – the first instance authority – in June 2016²⁴ and developed them further.

24. **FAC decision D-7898/2015 from 30 January 2017:** illegal exit from Eritrea is, *per se*, no longer sufficient to justify the granting of refugee status. According to the FAC, the sanctions that the persons concerned risk due to illegal exit are neither of sufficient intensity, nor are they politically motivated, and thus cannot form the basis for a grant of international protection under the Refugee Convention. This conclusion is first and foremost based on the FAC's observation that many Eritreans supposedly travel back to Eritrea without encountering problems. Furthermore, the FAC stated that the risk of recruitment to national service would not be relevant under the refugee convention as it was not politically motivated (paragraph 5.1).

25. **FAC decision D-2311/2016 from 17 August 2017:** the FAC identified different categories of persons who are likely to have been exonerated from the obligation to perform national service. According to the FAC, these persons do not face recruitment in case of return and have the possibility of "normalizing" ("*regeln*" paragraph 13.2) their relationship with the Eritrean regime. According to the Court, these groups include:

- Women, especially married women.
- Men and women who have left Eritrea at the age of 25 or older.
- Persons who have served in the Eritrean national service for 5 to 10 years.

26. Persons falling within the above categories do not, according to the FAC, have a well-founded fear of being exposed to "serious disadvantages" because they would not risk being detained for a violation of their duty to complete national service or to be drafted for national service ("*wegen Missachtung ihrer Dienstpflicht inhaftiert oder wieder in den Nationaldienst eingezogen würde*" paragraph 14.1) in case of return, i.e. there is no risk of violations of articles 3 and/or 4 ECHR (paragraph 13.3).

27. **FAC decision E-5022/2017 of 10 July 2018:** the FAC held that Eritrean national service constitutes forced labour within the meaning of article 4 § 2 ECHR because the conditions of service represent a 'disproportionate burden' on the individuals

²³ The FAC is the first and last court of appeal in asylum matters in Switzerland. Therefore, its precedent decisions cannot effectively be challenged at national level.

²⁴ SEM, Faktenblatt Eritrea, 23.6.2016. The SEM has taken the decision to harden its position following to two Fact finding missions to Eritrea in January and February 2016 which resulted in a report on the Eritrean national service and illegal exit (SEM, Focus Eritrea; Update *Nationaldienst und illegale Ausreise*, 22.6.2016, in: <https://www.sem.admin.ch/dam/data/sem/internationales/herkunftslaender/afrika/eri/ERI-ber-easo-update-nationaldienst-d.pdf>).

concerned ("*unverhältnismässige Last*", paragraph 6.1.5.2). Nevertheless, according to the FAC, national service must be viewed within the context of the Eritrean socialist economic system and in light of the state doctrine of *self-reliance*. Also, the FAC considered that it could not be established that every person required to perform military service would be a victim of ill-treatment or sexual abuse, as this had only been documented in individual cases ("*zwar in Einzelfällen hinreichend dokumentiert sind*", *ibid*). Such violations could therefore not be considered "systematic" ("*flächendeckend*" paragraph 6.1.5.2). Based on this analysis, it concluded that conditions of national service did not constitute a *flagrant* breach of article 4 § 2 ECHR nor a breach of article 3 ECHR. The risk of being recruited into national service on return would therefore not in and of itself constitute a violation of the *non-refoulement* prohibition.

28. The three decisions presented above represent the current position of the Swiss authorities with respect to Eritrean asylum cases.²⁵ Under this position, international protection is granted only in cases of deserters and conscientious objectors, i.e. persons who have already been recruited into national service or who have been officially summoned for service by the Eritrean military authorities ("*[es ist] jeglicher Kontakt zu den Behörden relevant, aus dem erkennbar wird, dass die betroffene Person rekrutiert werden sollte*", headnote) before they leave Eritrea.²⁶
29. In our opinion, this restrictive view cannot be justified by reference to a change in the human rights situation in Eritrea because there exists no reliable information demonstrating that the situation has undergone a fundamental improvement.²⁷ A number of recent reports including by the European Asylum Support Office (EASO)²⁸ and the U.N. Special Rapporteur on the Situation of Human Rights in Eritrea²⁹ confirm that the human rights situation has not changed. Surprisingly, the absence of reliable information on an improvement of the human rights situation in Eritrea is explicitly acknowledged by the FAC in all of the three lead judgments. This observation however, did not prevent the court from concluding that the expulsion of persons of draft age who have left the country illegally, is not *per se* contrary to the *non-refoulement* prohibition.³⁰ In this context, we believe that the restrictions in access to international protection for Eritreans constitutes a *de facto* and impermissible reversal of the burden of proof.³¹

²⁵ Recent example: FAC decision E-7046/2017 of 26 July 2019.

²⁶ Decision of the former Swiss Asylum Appeal Commission JICRA 2006/3.

²⁷ On the contrary, see Committee against torture CAT, *M.G. v. Switzerland*, 7 December 2018, CAT/C/65/D/811/2017, § 7.3; Human Rights Council, 41st session, 24 June – 12 July 2019, Report of the Special Rapporteur on the situation of human rights in Eritrea, Daniela Kravetz, 16.5.2019, A/HRC/41/53.

²⁸ European Asylum Support office EASO, COI Report: Eritrea - National service, exit, and return, September 2019, in:

https://coi.easo.europa.eu/administration/easo/PLib/2019_EASO_COI_Eritrea_National_service_exit_and_return.pdf.

²⁹ Report of the Special Rapporteur on the situation of human rights in Eritrea, Daniela Kravetz, 16.5.2019, A/HRC/41/53.

³⁰ FAC E-5022/2017 recital 4; D-2311/2016 recital 10; D-7898/2015 recital 4.6.

³¹ See Swiss refugee Council, *Analyse des durcissements de la pratique suisse à l'égard des requérant-e-s érythréen-ne-s*, Recherche du service juridique, 13.12.2018, in : <https://www.fluechtlingshilfe.ch/assets/news/eritrea/181213-recherche-osar-erythree.pdf>, p. 12.

30. In light of the above, we conclude that Swiss practice contravenes the principle of *non-refoulement*. In particular, it is contrary to the holding of the European Court of Human Rights (ECtHR) in *M.O. v. Switzerland* according to which illegal exit from Eritrea by persons of, or approaching draft age, carries a real risk of violating article 3 ECHR, in circumstances where the persons has rendered their illegal exit credible.³²
31. With regard to the risk of a violation of article 4 § 2 ECHR, the lead judgment of the FAC opines that the prohibition of forced labour is not of an absolute nature. Therefore, article 4 § 2 ECHR entails the prohibition of *refoulement* only in cases where there is a real risk of a ‘flagrant’ violation (“*ernsthafte Risiko einer flagranten Verletzung*” paragraph 6.1.5). The FAC denies such a risk of ‘flagrant’ violation concerning Eritrean national service because it is not possible to establish a concrete risk of mistreatment in every individual case. This analysis is, from our point of view, contrary to the existing case law of the ECtHR, not only with respect to the nature and scope of the prohibition of forced labour but also regarding the threshold (‘flagrant violation’) required for triggering the *non-refoulement* rule.³³ In other words, the requirement that a violation of the prohibition of forced labour be ‘flagrant’ to render an expulsion unlawful, has no basis in international law or jurisprudence.
32. The position of Switzerland is in clear contradiction to the European consensus on the need of international protection of Eritreans.³⁴
33. At the international level, the FAC’s precedent judgments on Eritrea have been challenged in several cases. At least one case is currently pending at the European Court for Human Rights (ECtHR)³⁵ and six cases are pending before the Committee against torture (CAT).³⁶ All these complaints pending at ECtHR and CAT concern persons who left Eritrea illegally and are of draft age.

1.2.2 Consequences for the situation of Eritrean asylum-seekers in Switzerland

34. Asylum statistics reflect the increasingly restrictive position of Switzerland because the rate of Eritreans whose asylum claims have been rejected and who are subject to a final removal order has increased significantly. Between December 2015 and

³² ECtHR, *M.O. v. Switzerland*, N° 41282/16, decision from 20.6.2017, § 79, where the ECtHR refers to the judgment of the Upper Tribunal of the United Kingdom in the case of MST and Others.

³³ ECtHR, *Siliadin v. France*, N° 73316/01, 2005-VII, decision of 26 July 2005, § 82 and § 112; *Rantsev v. Cypress and Russia*, n° 25965/04, decision of 7 January 2010, § 283; *Stummer v. Austria*, N° 37452/02, decision of 7 July 2011, § 116; *V.F. v. France*, n° 7196/10, decision of 29 November 2011; 117 ff.; *Van der Musselle v. Belgium*, N° 8919/80, Serie A N. 70, decision of 23 November 2012, § 38; Upper Tribunal, *MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC)*, decision of 11 October 2016, § 293 and 425 ff.; Grabenwarter / Pabel, *Europäische Menschenrechtskonvention*, 5th ed., Munich 2012, p. 183.

³⁴ See Swiss refugee Council, *Analyse des durcissements de la pratique suisse à l’égard des requérant-e-s érythréen-ne-s*, Recherche du service juridique, 13.12.2018, in : <https://www.fluechtlingshilfe.ch/assets/news/eritrea/181213-recherche-osar-erythree.pdf>.

³⁵ N.A. v. Switzerland, Application no. 52306/18.

³⁶ CAT, N° 850/2017, A.A. v. Switzerland (complaint against FAC guiding decision D-2311/2016 of 17.8.2017); CAT, N° 887/2018, A.Y. v. Switzerland; CAT, N° 914/2019, A.T. v. Switzerland (complaint against decision revoking temporary admission); CAT, N° 953/2019, S.D. v. Switzerland; CAT, N° 900/2018, B.H. v. Switzerland; CAT, N° 916/2019, H.M. v. Switzerland.

February 2016, the average rate of final removal orders concerning Eritrean asylum-seekers was 6.8 %. Between June and August 2018 it jumped to 16.6 %.³⁷ It is important to note that the family members of refugees arriving to Switzerland for family reunification as well as the children of recognized Eritrean refugees born in Switzerland within the relevant period (and therefore granted refugee status as well) are taken into account as positive decisions within the statistics of the SEM. Therefore, the rejection rate would be much higher if the inclusion of family members in the refugee status of the principal applicant, were not included.

35. Eritrean asylum-seekers who have final expulsion orders cannot be forcibly removed to Eritrea because there is no readmission agreement between Eritrea and Switzerland. Eritreans are subject to the so-called emergency assistance regime. The manner in which the emergency assistance is implemented varies considerably from Canton to Canton. We therefore focus on the general rules and illustrate them with concrete examples when necessary.
36. For persons with final expulsion orders, the SEM normally sets a deadline ('departure deadline') by which they must leave Switzerland. The same goes for persons who have an obligation to leave Switzerland because their residence authorization or leave to remain is revoked.
37. On expiry of the departure deadline, the foreign national loses his right of stay. From this point onwards, their stay is considered illegal. Illegal stay is subject to criminal penalties. Under art. 115 (1) let. b of the Federal Act on Foreign Nationals and Integration (FNIA), any person who stays unlawfully in Switzerland, risks a custodial sentence not exceeding one year or to a monetary penalty. Continuous and uninterrupted illegal stay is considered as a continuing offense. A person can be convicted multiple times if they continue to stay illegally in the country (Federal Court (FC), leading decision BGE 135 IV 6 E. 3). Moreover, Swiss authorities can order coercive measure under the law on foreign nationals, especially restriction and exclusion orders (art. 74 FNIA), detention pending deportation due to lack of cooperation in obtaining travel documents (art. 77 FNIA) or coercive detention (art. 78 FNIA). CSDM is aware of cases of Eritrean nationals with final expulsion orders who have convictions for illegal stay since Switzerland hardened its asylum practice for Eritrean asylum-seekers. At least in one of these cases, the court has confirmed the summary penalty order on appeal.³⁸
38. Authorization to work as well as the possibility of pursuing educational programs, such as apprenticeships, are revoked on expiry of the departure deadline.³⁹ Therefore, affected individuals have no possibility of supporting themselves through gainful employment, cannot continue their studies and are forced to rely on emergency

³⁷ SEM, statistiques d'asile, in : <https://www.sem.admin.ch/sem/de/home/publiservice/statistik/asylstatistik.html>. The periods of time chosen are the last 3 month before the Fact finding missions that Switzerland conducted in Eritrea in the beginning of 2016 as well as the three month following the last leading decision of July 2018. La période choisie correspond aux trois mois avant le terme des FFM de la Suisse en Erythrée.

³⁸ For example in the case of S.D. whose case is pending at CAT (CAT, N° 953/2019, S.D. v. Switzerland).

³⁹ Only children continue to benefit from the right to basic education (art. 62 (2) Federal Constitution) on expiry of the departure deadline.

assistance to survive. The latter is guaranteed by article 12 Federal Constitution (article 82 AA) which provides for minimal subsistence guarantees to all persons.

39. According to article 82 (4) AA, emergency aid must whenever possible, be provided in the form of non-cash benefits. The modalities of and access to this minimal support is defined by Cantonal law, and in practice it is about the equivalent to a daily amount of 8 to 12 Swiss francs.⁴⁰ Emergency aid includes primary health care. In many cases, psychological support is not accessible. Also, if long-term medical treatment is necessary, doctors do refuse to prescribe such treatment if the person concerned is subject to a removal order. Emergency housing is often located in remote areas or in underground structures (so called 'civil protection shelters'). Often the persons concerned, especially single men are forced to leave the shelter during day-time and to take all their belongings with them.
40. In order to remain eligible for emergency assistance, the persons concerned are subject to reporting requirements which vary by Canton. The requirements may involve presenting themselves in person every two weeks at the cantonal migration authority, up to presenting themselves twice a day (morning and evening).
41. Asylum-seekers whose request has been rejected do not have any possibilities of family reunification.
42. Article 12 Federal Constitution provides that persons who are unable to provide for themselves have the right to assistance and care, and to the financial means required for a standard of living consistent with human dignity. Yet, authoritative commentary has clearly observed that the emergency assistance regime is not conceived for the long term, but only – as its name suggests – for emergency situations. If individuals depend on emergency assistance during a long period of time, this regime is not sufficient to guarantee a dignified life.⁴¹
43. And yet, this is exactly the scenario that a very high number of Eritrean asylum seekers are facing in Switzerland: their asylum requests have been refused on grounds that are highly questionable and as they are still facing a risk of torture, inhuman and degrading treatment or forced labor, but cannot be returned by force, they will stay in Switzerland for an indeterminate period. Also, in reality, there is almost no possibility to regularize their status, not even after many years.⁴²

⁴⁰ See Überblick der SODK: Asylgesetzrevision 10.052: Unterstützungsleistungen der Kantone im Asylbereich vom Sommer 2012, aktualisiert 2017.

⁴¹ Constantin Hruschka, dans: Spescha et al., Migrationsrechtskommentar, 4. Auflage, Zürich, 2015, Art. 83a AsylG, N1.

⁴² Article 14 (2) AA foresees the possibility for the canton, with the consent of the SEM, to grant a residence permit to a person under very strict conditions that are extremely difficult to fulfil. In practice, very few request based on art. 14 (2) AA are accepted by the Swiss authorities and the practice varies greatly between Cantons. CSDM is aware of several cases of persons whose asylum claim had been rejected and who have been living in Switzerland without legal status for many years without being granted a residence permit on an art. 14 (2) AA request (as one example of many : rejected asylum-seeker in Switzerland since 2011 (N 571029) or rejected asylum seeker in Switzerland since 2010 (N 536 112)).

D. Conclusion

44. In conclusion, the restriction of Swiss asylum practice concerning Eritrean asylum seekers targets Eritreans in a discriminatory manner because of their particular nationality. No objective ground exists that would justify such a distinction. It must therefore be considered as racial discrimination as defined in Art. 1 of the Convention. By establishing this practice and adhering to it, Swiss authorities are violating Art. 4 lit. c of the Convention.
45. This discriminatory practice is the result of racism and xenophobia in politics and media and leads to extremely difficult and inhuman situations for an especially vulnerable group of persons. Both aspects had already been criticized by the Committee in its last Final observations.