BVGer [Federal Administrative Court FAC – Bundesverwaltunggericht]
Tribunal administratif federal
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[logo]

Department IV
D-1938/2014

Judgment of 6 June 2014

Composition of the court	Judge Hans Schürch (Presiding), Judge William Waeber Judge Martin Zoller. Court Reporter Eva Züricher
Parties	A. _____, born (…), Eritrea, represented by B. _____ (…), Appellant, vs. **Federal Office for Migration (FOFM)** [*Bundesamt für Migration (BFM)]* Quellenweg 6, 3003 Bern, Lower Court
Subject matter	Application for asylum from abroad and entry permit; FOFM Order dated 20 March 2014 / N (…).

[*pp. 2-7 deleted*]

5.

5.1 An application for asylum can, pursuant to Art. 19 para. 1 Asylum Law [AsylG – Asylgesetz], be submitted abroad at a Swiss consulate, which will transfer it to the FOFM (cf. old Art. 20 para. 1 FOFM). Regarding the procedure, Art. 10 para. 1 of the Asylum Regulation 1 dated 11 August 1999 (AsylRI, SR [Swiss Law Collection (SR – Schweizerische Rechtssammlung) 142.311), provides that the Swiss consulate as a rule will interview the person seeking asylum. If this is not possible, then the grounds for asylum are to be recorded in writing (Art. 10 para. 2 AsylRI).

5.2 The circumstance that the present application for asylum was not submitted to a Swiss consulate abroad, but directly to the FOFM, is not significant (cf. FACD [Federal Administrative Court Decisions (BVGE – Bundesverwaltungsgerichtsentscheidungen]) 2011/39 E. 3). The FOFM correctly received the submission dated 11 April 2012 or 4 March 2012 as an application for asylum from abroad. Further, against the significant practice regarding the management of applications for asylum from abroad and entry permits as well as the evidence in the file, it can be determined that in this case the Swiss consulate in Tel Aviv could waive an interview with the petitioner and that the lower court's invitation to respond dated 8 January 2013 was sufficient to comply with the applicable procedural requirements FACD 2007/30 E. 5). Finally, as part of the submission of 5 February 2013 in response to the questions of the FOFM a detailed statement was prepared that the appellant used to set out the grounds for the asylum application.

5.3 The FOFM can refuse to grant asylum, and thus also entry in Switzerland, to a person located abroad if no indications of serious disadvantages* within the meaning of Art. 3 Asylum Law are present or if the person can be expected to make an effort to obtain asylum in another country (Art. 3 and Art. 7 Asylum Law and old Art. 52 para. 2 Asylum Law). Pursuant to the old Art. 20 para. 2 Asylum Law, the FOFM shall grant entry to a person seeking asylum for the purpose of clarifying the facts of the case, if that person cannot be expected to remain in their country of residence or current location or to travel to another country. A person who is in need of protection cannot be expected to remain at their location. A person is at a serious disadvantage within the meaning of the Asylum Law if are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions in their native country or in their country of last residence.

* Unofficial translation of the Swiss government, downloadable from: www.admin.ch/ch/e/rs/142_31/a3.html

Serious disadvantages include a threat to life, physical integrity or freedom as well as measures that exert intolerable psychological pressure. (Art. 3 Asylum Law).

5.4 The grant of an entry permit is subject to strong conditions regarding which the authorities have broad discretionary powers. In addition to the requirement of serious disadvantage pursuant to Art. 3 Asylum Law, namely the proximate relationship to Switzerland, the possibility of obtaining protection from another state, the practical possibility and objective reasonableness of the search for protection elsewhere, as well as the likeliness of integration and assimilation must be taken into account. The abovementioned person's subjection to serious disadvantages is decisive for the grant of an entry permit. But entry must be denied, even in case of a serious disadvantage, if there are grounds to deny asylum (cf. FACD 2011/10).

6.

6.1 The appellant alleges that he was imprisoned on 29 January 2004 on the grounds of having criticized the Eritrean government and kept in prison until 7 September 2004. He left his homeland on 25 September 2004 and fled to C. _____where in the meantime he was in fear of deportation. For this reason, he travelled on to D. _____. Because his aunt who lived there was not longer able to support him due to loss of her employment, he returned to C. _____ at the beginning of September 2007, where he however found himself in the same situation as in 2005, which is why, after a short stay in that country, he travelled to Israel where he has been since 15 December 2007. In a submission to the FOFM dated 1 March 2014, the appellant further explained that in one month's time he will be transferred to a detention center.

6.2 He argues in the appeal that the facts of the case have changed in the meantime. In April 2014, the appellant received a summons from the Israeli authorities stating that he must go to a detention center for Eritrean refugees in 24 days. He expects to be deported to Eritrea soon, because he no longer has a temporary residence permit. The situation of Eritrean refugees has deteriorated dramatically and they are no longer safe. Because they have serious

difficulties in their homeland, it is not reasonable to deport them to Eritrea.

6.3 The FOFM concluded, in the order that has been challenged here, that it is reasonable for them to remain in Israel where he has a legal residence permit and where he has no reason to fear deportation back to his homeland.

7.

7.1 Where the person seeking asylum, as in the present case, resides in a third country, it may be assumed that this person already has found protection against persecution or could receive it, for which reason it may also be assumed that it is reasonable to expect that the person will remain there or will make an effort to be allowed to remain. This assumption, however, can prove to be invalid regarding the grant of asylum by the third state as well as regarding the reasonableness of the claim for protection in the third state. Therefore, we must examine whether the person seeking asylum has found or can find protection against persecution, which usually will result in rejection of the application for asylum and refusal of the entry permit. In this case, the criteria that allow refuge to be sought in this third country to appear to be reasonable must be examined, and weighed against any proximate relationship to Switzerland. The particular proximity of the asylum seeking person's relationship to Switzerland is an important criterion in this assessment (cf. BVGE 2011/10 E. 5.1 with further references; judgment of the FAC {...}).

7.2 The criterion of the particular relationship is, regarding the degree of relationship, not limited to the narrowly defined circle of the asylum seeker's immediate family pursuant to Art. 51 Asylum Law. Other family relationships to people outside the immediate family must be taken into account. The proximate relationship to the third state or to another state, as well as the likelihood of integration and assimilation in Switzerland, the third state or other states must also be considered. The fact that the asylum seeker lacks a particular relationship to Switzerland, is therefore not in itself decisive for the rejection of the application for asylum. If the asylum seeker in a third state, entry to Switzerland may, for example, be approved, if the third state cannot offer sufficient assurance of a proper asylum procedure and deportation to the home state cannot be excluded,

even if the asylum seeker lack a relationship to Switzerland. On the other hand, the fact that a relationship to Switzerland exists, namely, because close relatives reside here, must not necessarily lead to the approval of an entry permit, where, on the basis of an assessment with other criteria, the continued residence in the third state can be considered objectively reasonable (cf. judgment of the FAC {...}).

7.3 It its order, the FOFM explains, in particular regarding the appellant's situation in Israel, that to its certain knowledge Eritrean nationals in general and the appellant in particular have group protection status. Consequently, he is not threatened by deportation to his homeland. The FOFM knows that the situation of Eritrean nationals in Israel is more difficult than for refugees in Switzerland. Still, members of the Eritrean community in Israel have good connections with each other and numerous NGOs take care of the needs of asylum seekers and refugees. Therefore, the appellant should find it possible to lead a decent life in Israel. Neither the likelihood of integration and assimilation nor the sister's residence in Switzerland, in the assessment of all aspects of the situation, necessarily lead to the conclusion that it must be Switzerland that can ensure the necessary protection.

7.4 In response, the appellant argued that he is afraid he will be deported to his homeland because he received a summons from the Israeli authorities saying that he must report to a detention center for Eritrean refugees within 24 days. He no longer has a residence permit in Israel. Furthermore, the situation of Eritrean refugees in Israel has deteriorated and they are no long secure.

The following facts can be determined regarding the situation of asylum seekers and refugees in Israel: Until 2005, there were only a very low number of asylum seekers each year. Since then, the number has increased markedly, In 2011, almost 17,000 persons arrived in Israel via Egypt, of which 96% are Eritrean and Sudanese nationals. The country only has a national asylum procedure since 2009. The UNHCR was responsible before than. Since the founding of Israel in 1948, 200 people have received refugee status. Since

2005, 30 people have been recognized as refugees (cf. Swiss Refugee Help [*Schweizerische Flüchtlingshilfe – SRH*] [Alexandra Geiser, Israel: The Situation of Eritrean Refugees in Israel – new Developments [*Situation eritreischer Flüchtlinge in Israel neue Entwicklungen*], Bern, 8 April 2014, p. 1 et seq. [hereinafter: SFH 1] and SFH, Alexandra Geiser, Eritrea: Situation of Eritrean Refugees in Israel [Eritrea: *Situation eritreischer Flüchtlinge in Israel*], 13 August 2012 p. 1 *et seq*. [hereinafter: SFH 2]). In 2013, as well, the recognition rate based on decisions taken was less than one percent (cf. SFH 1 p. 5). The largest number of asylum seekers, in particular outside detention centers, have no access to asylum procedures, although Eritrean nationals enjoy so-called group protection. They are issued a conditional release visa that temporarily protects them from deportation to their homeland. Their deportation is only postponed thereby. The conditional release visa, which is valid for three months, does not give the holders access to any social services, opportunities for work, or to medical care (cf. SFH 1 p. 5). In addition, extension of these documents often entail long waiting periods and the chicaneries of the Israeli authorities (cf. SFH 1 p. 1 and 5 as well as SFH 2 p. 3 et seq.). New arrivals are put into immigration detention. The number of places in detention is continuously growing (SFH 1 p. 1). On 10 January 2012, the Israeli parliament adopted amendments to the Prevention of Infiltration Law. This law now labels all foreigners who enter illegally as "infiltrators". The law allows the Israeli authorities to detain asylum seekers and their children for up to three years. The detainees have no access to a lawyer. The detention decision is re-examined first after 14 days and then after every 60 days. An asylum seeker can also be prosecuted for "infiltration" and sentenced to several years imprisonment (cf. SFH 1 p. 2 and SFH 2 p. 6 *et seq*.). Based on this amendment of the law, about 2,000 migrants, asylum seekers and their children who entered illegally were placed in Saharonim Prison and in tents in Ktzi'ot Prison (cf. SFH 1 p. 3 et seq.). After the Supreme Court overturned this amendment to the Infiltration Law as unconstitutional on 16 September 2013, the Knesset adopted the next amendment on December 2013. It provided that newly arriving infiltrators could only be detained for at least one year (and not, as before, for three years). In contrast, this amendment to the Prevention of Infiltration Law allows African male migrants and asylum seekers, also including individuals who may not be deported, to be placed for indefinite periods in so-called "open" facilities or institutions in the desert

(cf. SFH 1 p. 9). This amendment includes persons already in detention and those who hitherto have been living in Israel. By means of what the SFH calls more draconian measures and the payment of financial incentives to return, the new law is designed so that people will leave Israel "voluntarily" out of fear of an undetermined period of detention in an open facility. One of these open facilities is Holot, which is in the Negev desert far from any civilization, in an Israeli army training area. The facility consists of shipping containers, is surrounded by a four meter high fence and is 65 km from the nearest city (Beersheba). It has 3,300 places and is planned to be increased to 11,000 places. People held in Holot are not allowed to work outside the facility, must report several times per day and are not allowed to leave the facility for more than 48 hour without a special permit. Violation of the rules is punished by a transfer to a closed detention facility; the decision by the authorities may not be reviewed by the courts (cf. SFH 1 p. 9 et seq.). The UNHCR criticized the risk of unlimited detention of people who may not be sent back to their homelands because of the non-refoulement commandment. Moreover, according to UNHCR, not only newly arrived asylum seekers are detained for a minimum of one year, but also those whose conditional release visa has expired (cf. SFH 1 p. 10 *et seq*.). A multiyear residence in Israel is sufficient grounds for a summons requiring the recipient to report to the Holot open facility within by a deadline. Whoever does not comply will be detained. By March 2014, more than 3,000 asylum seekers who had been living in Israel for more than four years received such a summons. Only 40% of them reported to Holot. The others are now subject to a prison sentence. Under these circumstances, it is more and more difficult to obtain a conditional release visa, which lately has become valid for only one month. Following the last amendment of the anti-infiltration law in December 2013, about 2,200 African migrants had by the end of February 2014 agreed to depart voluntarily (SFH 1 p. 12 *et seq*.). According to SFH, the number has increased since then. According to SFH's knowledge, the migrants will be sent to Uganda and Rwanda on the basis of possible bilateral agreements. The SFH, based on certain indications, assumes that the deportees will be forced to live in prison-like conditions; individual cases will be deported to Eritrea and arrested there or deported to other states.

They would have no legal status or papers in Uganda to allow them to leave the country (cf. SFH 1, p. 15)

7.5 The Federal Administrative Court arrived at the conclusion, based on the evidence in the file, that the petitioner could possibly have serious difficulties with the authorities in his home country. The examination of the reasonableness of remaining in Israel produced the following: The precarious situation relating to shelter and work, taken alone, might not be regarded as sufficient in themselves as grounds for the unreasonableness of a claim of protection at his current location; on the other hand, the facts of the case lead to the conclusion that the appellant is in real danger of being imprisoned or of being held in a so-called open facility for an undetermined time and to be forced to depart, as the Israeli authorities have the intention of imprisoning thousands of Eritrean nationals, and the appellant submitted a copy of a detention order for Holot Detention Centre to the case file and presented the original for view by the Swiss consulate in Tel Aviv (cf. Human Rights Watch [HRW], Israel: Detained Asylum seekers Pressured to Leave, dated 13 March 2013). Therefore, it must be assumed in this case that he will be held for an indefinite period in Holot and who – in contrast to the FOCM's description – will not long have a temporary residence permit, which would only be renewable for one month at a time, as the copy of the detention order shows that he is regarded as an infiltrator or intruder and will not receive a visa any more. In addition, it must be assumed that any opportunity for integration and assimilation in Israel is cancelled by detention order. Rather, by detaining the appellant in a facility that he can only leave with permission, in the middle of the Negev desert, 65 km from the next city and without the possibility of work, must be regarded as a separation and expulsion measure. Furthermore, there is the risk that he will be deported to a third state such as Uganda, where it is unclear what fate will threaten the appellant in that country. Under these circumstances, it is not reasonable for the appellant to be expected to remain in Israel and seek protection there.

7.6 There must also be an examination of whether, based on all the circumstances of the case, Switzerland is the country that should grant the appellant the necessary protection. In this assessment, the proximate relationship the asylum seeker has

to Switzerland is a central, if not – as can be taken from the foregoing considerations – the only criterion (cf. also in this regard the FAC judgment {...} E. 5.4.8 and further practices cited therein). The appellant has a relationship to Switzerland through his sister, who has been recognized as a refugee in Switzerland and who represents him the present proceeding. This certain relationship to Switzerland that is assumed to facilitate the appellant's assimilation because of the relationship to his sister, constitutes, in connection with his precarious situation in Israel where his only right derives from Israel's compliance with the non-refoulement commandment, a sufficient basis in the present case to confirm that his residence in Israel is unreasonable. Nothing can be found in the file to show that the appellant, for example, has connecting factors in Uganda, deportation to which country cannot be excluded according to the current state of knowledge. Thus, the FOFM applied the exclusions clause pursuant to the old Art. 52 para. 2 Asylum Law incorrectly.

7.7 In conclusion to the foregoing, the appellant must be granted entry into Switzerland to carry out the proper asylum procedure.

8.

8.1 No costs shall be imposed related to this conclusions of the proceeding (Art. 63 para. 1 and 2 APA [Administrative Procedure Act (VwVG – Verwaltungsverfahrensgesetz)). The appellant's advance payment of costs on 23 April 2014 shall be reimbursed, following approval of the subsequent application for legal aid pursuant to Art. 65 para. 1 APA.

8.2 The appellate authority may award the party who was successful in whole or in part, ex officio or on application, a payment in respect of the costs incurred that were necessary and comparatively high. (Art. 64 para. 1 VwVG in connection with Art. 7 para. 1 and 2 of the regulation dated 21 February 2008 regarding costs and compensation before the Federal Administrative Court [VGKE [Federal Court Costs Decisions], SR 173.320.2]). The petitioner is not represented in this matter by his sister living in Switzerland, and it has also not been claimed and is not apparent in the evidence of the case that and to what extent comparatively high costs have arisen. For this reason, no attorney's fees are awarded.

(Operative provisions next page)

Therefore, the Federal Administrative Court finds:

1.
The complaint is upheld on the basis of the analysis.

2.
The FOFM order dated 20 March 2014 is reversed.

3.
The FOFM is directed to grant the appellant entry to Switzerland for the purpose of carrying out a proper asylum procedure.

4.
No procedural costs will be applied.

5.
The application for legal aid pursuant to Art. 65 para. 1 APA is approved.

6.
The petitioner's advance payment of costs shall be reimbursed.

7.
No attorney's fees are awarded.

8.
This judgment will be forwarded to the petitioner and the FOFM.

Presiding Judge:	Clerk:
Hans Schürch	Eva Zürcher

To send

Abbreviations in this translation

The following abbreviations have been used in this translation:

German abbrevia-tion	English abbrevia-tion	German full name	English full name
AsylG	Asylum Law	Asylgesetz	Asylum Law
BVerGer	FAC	Bundesverwaltungsgericht	Federal Administrative Court
BVGE	FACD	Bundesverwaltungsgerichts-entscheidungen	Federal Administrative Court Decisions
VwVG	FAPA	Verwaltungsverfahrensgesetz	Administrative Procedure Act
BFM	FOFM	Bundesamt für Migration	Federal Office for Migration
SFH	SFH	Schweizerische Flüchtlingshilfe	Swiss Refugee Help
SR	SR	Schweizerische Rechtssammlung	Swiss Law Collection