CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 2345/02
by Mahmoud Mohammed SAID
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 17 September 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged on 14 January 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mahmoud Mohammed Said, is an Eritrean national, who was born in 1967 and is currently staying in the Netherlands. He is represented before the Court by Mr G. Ris, a lawyer practising in Rotterdam.

A. The circumstances of the case

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

On 8 May 2001 the applicant arrived in the Netherlands, where, on 21 May 2001, he applied for asylum (*verblijfsvergunning asiel voor bepaalde tijd*) at the asylum application centre (*aanmeldcentrum*, "AC") at Schiphol. A first interview with an official of the Immigration and Naturalisation Department of the Ministry of Justice took place that same day, in order to establish the applicant's identity, nationality and travel route. The next day he was interviewed about the reasons for his request for asylum. The applicant submitted the following.

After having fulfilled his 18-months' military service from 1 December 1995, the applicant was again called up during a general mobilisation in April 1998. He served as a soldier in an anti-tank unit and fought in the war against Ethiopia. Whilst in the army, the applicant, who is a Sunni Muslim, was not allowed to practise his religion: fasting and praying were forbidden to him.

Although the war ended on 13 June 2000, demobilisation did not commence until considerably later because the Eritrean authorities feared further military incursions from the Ethiopians. In August 2000 a meeting was held with the applicant's battalion, consisting of between 5,000 and 7,000 men, in order to evaluate its performance in the war. According to the applicant, it is customary for such meetings to be held, and they allow the higher army echelons to cover up their mistakes by putting the blame for an unsuccessful campaign on the soldiers. During this meeting the commanders said the soldiers had not fought well. The applicant said this was because the commanders had insisted that hungry, thirsty and tired soldiers should continue fighting at the front, which resulted in casualties. He said his unit should be replaced or strengthened. Other soldiers present at the meeting also voiced criticisms, saying there were not enough weapons, for example. However, when the applicant had spoken out, the other soldiers voicefully supported him and an argument ensued.

For some time after the meeting, he had the feeling that the army authorities were keeping an eye on him; thus, he thought he was being followed whenever he visited other units and he was denied permission to go to town. However, when he thought everything had been forgotten, he

was summoned to the battalion's headquarters on 5 December 2000. There, he was informed that he had incited the soldiers. He was made to hand over his weapons and was detained in an underground cell for almost five months. He was neither interviewed, charged nor brought before a military tribunal.

On 20 April 2001 he was put into a Jeep, with a driver and a guard who were armed. He was neither handcuffed nor bound. While driving, they happened upon a military vehicle that had had an accident. Both the driver and the guard got out of the car, leaving the applicant, who seized his chance and escaped through the back of the car.

The applicant made his way unhindered to Sudan, avoiding official border posts. An acquaintance of his in Khartoum brought him into contact with a travel agent who arranged for a passport and flight tickets. Accompanied by the travel agent, the applicant flew to Belgium via Syria and another, unspecified European country. From Brussels they took a train to Breda in the Netherlands. There, the travel agent told the applicant they had reached their destination. The applicant was told to hand back the passport to the travel agent and to report to a police station.

Following his interviews on 21 and 22 May 2001, the immigration authorities considered that the applicant's request for asylum should be processed in the so-called AC-procedure, as it did not require time-consuming investigation and a prudent decision could be reached within 48 hours. Requests for asylum may be disposed of in this manner when it is beyond doubt that there is no risk of the return of the asylum seeker to his/her country of origin leading to a violation of either the United Nations 1951 Convention on the Status of Refugees or Article 3 of the Convention. Thus, on 23 May 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the request for asylum, finding incredible the applicant's account of his alleged escape and implausible the reason for his alleged detention.

The applicant lodged an appeal with the Regional Court (*arrondissementsrechtbank*) of The Hague sitting in Amsterdam and also requested an interim measure from the President of that court in order to prevent his expulsion. Pending these proceedings the applicant submitted a written statement made by a certain Mr Khalifa, to the effect that Mr Khalifa's son had been executed in Eritrea in October 2000 after he had been staying with his mother for three months without having obtained prior permission from his army commanders. On 18 June 2001 the President of the Regional Court rejected the request for an interim measure and, finding that further investigation could not reasonably contribute to the examination of the case, also dismissed the appeal. The President considered that the applicant's alleged desertion and his resulting fear of disproportionate punishment had not been made sufficiently plausible. It was unlikely that the army had still been mobilised at the time of the applicant's flight in

April 2001, given that the war had ended in June 2000 and the army, by the applicant's own account, had evaluated its performance in the war at a meeting in August 2000. The applicant's claim that he stood accused of incitement was based on pure supposition. In view of the simple way in which the applicant had allegedly managed to escape, the President further found it unlikely that the (army) authorities wished to harm the applicant. Finding the applicant's account thus neither credible nor plausible, the President deemed it unnecessary to hear Mr Khalifa as a witness.

The applicant filed an appeal to the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), arguing *inter alia* that further investigation of the case, and in particular of the question whether the Eritrean army had been demobilised at the time of the applicant's alleged desertion, was called for and feasible. The reasoning adopted by the President of the Regional Court as to the lack of credibility and plausibility of the applicant's account would be invalidated if it turned out that the army had still been mobilised in April 2001.

On 16 July 2001 the Administrative Jurisdiction Division rejected the appeal. It held that the applicant's appeal to the Regional Court had not been rejected for reasons related solely to the mobilisation, but also for reasons related to the applicant's account of his arrest and escape. Given the conclusions reached by the President of the Regional Court to the effect that the Deputy Minister had not been wrong in labelling the applicant's account as incredible, he (the President) had been entitled to decide not to hear Mr Khalifa as a witness. The fact that it was not in dispute that the applicant had served in the army did not affect this ruling.

B. Conditions in Eritrea

In support of his application, the applicant has provided the Court with information on the situation in Eritrea. Information relating to the demobilisation of the army and the treatment of deserters has been summarised below.

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

Information contained in the country report (*ambtsbericht*) of the Dutch Ministry of Foreign Affairs of March 2002 stated that, pursuant to the National Service Proclamation 82/1995 and the Eritrean Transitional Penal Code, the maximum penalty for desertion during mobilisation is life imprisonment or, in the most extreme case, the death penalty. In practice, deserters are not put on trial but instead are punished by their superiors, for example by forcing them to work in mines or to build roads. There were reports that in May/June 2000, during the war with Ethiopia, deserters who were caught *in flagrante delicto* were executed.

The United Nations Office of the Coordination of Humanitarian Affairs reported on 24 May 2002 that one week earlier, the Eritrean Government had begun the first phase of its military demobilisation.

A letter to the applicant's lawyer dated 27 May 2002 from the Horn of Africa-specialist of the Dutch branch of Amnesty International, stated that it is usual for the Eritrean army to get together after an offensive and to conduct an evaluation of that offensive. It was also not unusual for a considerable time to pass between openly expressed criticism and arrest, or for deserters to be punished by their superiors without trial. Demobilisation of the Eritrean army had commenced in May 2002.

Finally, the applicant submitted written statements made by two Eritreans currently living in exile in Germany and the United Kingdom respectively. The first statement, dated 6 March 2002, related how a relative of the author was executed in April 1999, following this relative's voluntary return to the army after attending his brother's funeral without permission from his commanders. According to the second statement, made on 11 March 2002 by one of the founders and senior members of the Eritrean People Liberation Front and former governor of a provincial capital, "conscripts and soldiers who leave the army are hunted down and killed".

COMPLAINTS

The applicant complains under Articles 2 and 3 of the Convention that his expulsion to Eritrea would expose him to a real risk of death, torture or inhuman or degrading treatment. Invoking Articles 6 and 13 of the Convention, he further complains of the asylum proceedings in the Netherlands.

THE LAW

A. Articles 2 and 3 of the Convention

The applicant submits that as a result of his desertion he runs a real risk of being executed if returned to Eritrea given that desertion during mobilisation is punishable by death. He also faces a real risk of torture and inhuman or degrading treatment or punishment at the hand of the Eritrean authorities. The applicant invokes Articles 2 and 3 of the Convention, which provide, in so far as relevant:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

Article 3

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

The Court considers that it cannot, on the basis of the case-file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

B. Articles 6 and 13 of the Convention

The applicant complains that the so-called AC-procedure, which the Dutch authorities used to process his request for asylum, is seriously flawed. According to the applicant, Article 6 of the Convention requires that the authorities observe a number of procedural rules when examining a claim that an expulsion would lead to a violation of Articles 2 and/or 3 of the Convention. In addition, Article 13 requires that those rules are applied in at least two instances and that the proceedings are not overly formalistic.

Articles 6 and 13, in so far as relevant, read as follows:

Article 6

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court is prevented from examining the complaint under Article 6 since this provision does not apply to proceedings concerning the entry, stay and deportation of aliens (see *Maaouia v. France* [GC], no. 39652/98, § 40, to be reported in ECHR 2000-X). It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and must be rejected, in accordance with Article 35 § 4.

In so far as the complaints raised under Article 13 are different from those raised under Article 6, and leaving aside the question whether the applicant has an arguable claim for the purposes of Article 13, the Court considers in the first place that this latter provision does not require that

there should be several levels of jurisdiction (see *Csepyová v. Slovakia* (dec.), no. 67199/01, 14 May 2002; *Zeissl v. Austria*, application no. 10153/82, Commission decision of 13 October 1986, Decisions and Reports (DR) 49, p. 67). Secondly, the word "remedy" within the meaning of Article 13 does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint (see *Lacko and Others v. Slovakia* (dec.), no. 47237/99, 2 July 2002; *K. v. the United Kingdom*, application no. 11468/85, Commission decision of 15 October 1986, DR 50, p. 199).

Having regard to the fact that the applicant had access to, and indeed also availed himself of, an effective remedy within the meaning of Article 13 of the Convention in respect of the alleged violations of Articles 2 and 3 of the Convention, namely the right of appeal to the Regional Court of The Hague against the decision of the Deputy Minister, the Court finds that no issues arise under Article 13 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints that his expulsion to Eritrea would expose him to a real risk of death, torture or inhuman or degrading treatment;

Declares the remainder of the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President