

COMMITTEE AGAINST TORTURE

Halimi-Nedzibi v. Austria

Communication No. 8/1991

18 November 1993

CAT/C/11/D/8/1991

VIEWS

Submitted by: Mr. Qani Halimi-Nedzibi [represented by counsel]

Alleged victim: The author

State party: Austria

Date of communication: 27 September 1991

Date of decision on admissibility: 5 May 1992

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 18 November 1993,

Having concluded its consideration of communication No. 8/1991, submitted to the Committee against Torture on behalf of Mr. Qani Halimi-Nedzibi under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and by the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Qani Halimi-Nedzibi, a Yugoslav citizen, currently imprisoned in Austria. He claims to be a victim of a violation of articles 12 and 15 of the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Austria. He is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 19 April 1988 and charged with drug-trafficking. The trial at first instance opened on 23 January 1989. He was convicted on 4 July 1990 of having been in charge of an international drug-trafficking organization which allegedly operated from Austria between November 1985 and December 1987. The court of first instance (Landesgericht für Strafsachen) sentenced him to 20 years' imprisonment, plus a fine of 2 million schillings, as well as a fine of 7 million schillings in place of the customs he failed to pay. On 4 July 1991, the Court of Appeal rejected the author's appeal against his conviction, but reduced the sentence of imprisonment to a term of 18 years.

2.2 The author alleges that following his arrest in 1988 he and six named witnesses were maltreated, beaten and tortured by police inspector J.J., who was in charge of the criminal investigation. They were allegedly coerced to make incriminating statements. The author's wife, who was in her third or fourth month of pregnancy, had a miscarriage shortly after she had been interrogated by police inspector J.J. The police inspector allegedly also threatened to kill the author. The author raised these matters before the investigating judge on 5 December 1988. In particular, he stated: "I was pressured so long until I admitted that the drugs belonged to me. Inspector J.J. grabbed me by the hair and threw me against the wall; he also submerged my head in a bucket of water ... I suffered an eye injury which required hospital treatment."

2.3 During the trial at first instance, author's counsel requested all statements made to inspector J.J. to be ruled inadmissible as evidence. He referred to the declaration made by Austria when ratifying the Convention against Torture in July 1987, which reads: "Austria regards article 15 of the Convention as the legal basis for the inadmissibility provided therein of the use of statements which are established to have been made as a result of torture." The court, however, ruled against his motion.

2.4 The Court of Appeal rejected counsel's plea for nullity of the judgement in first instance, taking into consideration the Austrian legislation, the non-substantiation of the allegations of ill-treatment and the fact that the evidence given by the main witnesses remained unchallenged. The Court of Appeal decided that in the circumstances the question of direct applicability ("**unmittelbare Anwendbarkeit**") of the Convention against Torture did not arise.

Complaint

3. The author claims that the failure of the Austrian authorities promptly to investigate his allegations of torture and the refusal of the courts of first and second instance to exclude as evidence against him statements allegedly made by him and several witnesses as a result of torture constitute a violation of articles 12 and 15 of the Convention.

State party's observations and the author's comments thereon

4.1 The State party, by submission dated 27 February 1992, argued that the communication was inadmissible.

4.2 It submitted that criminal proceedings against Inspector J.J., initiated on 5 March 1990, following a complaint by the author, were still pending. The length of the investigations was attributable to the fact that difficulties had arisen in obtaining the testimonies of witnesses in the former Yugoslavia and Turkey. The State party indicated that, if Inspector J.J. would be found guilty of having ill-treated detainees in order to obtain incriminating statements, the author's case could be reopened. It argued that a retrial would constitute an effective remedy.

4.3 The State party further contended that the author could have appealed to the Constitutional Court under section 144 of the federal Constitution, as he claims to be a victim of abuse of administrative power and compulsion.

4.4 Since no appeal to the Constitutional Court had been submitted by the author and criminal proceedings against Mr. J.J. were still pending, the State party argued that the communication was inadmissible under article 22, paragraph 5 (b), of the Convention, on the ground of non-exhaustion of domestic remedies.

4.5 The State party moreover argued that the communication was inadmissible as incompatible with the provisions of the Convention. It submitted that the allegations that the witnesses had been tortured were not raised before the investigating judge, but only during the trial, after the witnesses were confronted with their statements; prior to these allegations the statements were properly deemed to be admissible evidence. Moreover, the State party argued that the witnesses gave independent, admissible evidence before the investigating judge. The State party stated that only one witness disputed the correctness of the statement made to the police; however, his statement did not incriminate the author. The correctness of other statements was not in dispute.

4.6 As concerns the author, the State party conceded that he claimed before the investigating judge to have been subjected to torture; however, according to the State party, he denied the charges against him and did not make a confession as such; thus it cannot be said that his statements were used as evidence in violation of article 15.

4.7 Finally, the State party submitted that it appears from the trial record that the jury's verdict was not based on the statements made by the witnesses who had claimed to have been subjected to torture.

5.1 In his comments on the State party's submission, counsel maintained that the communication should be declared admissible.

5.2 As regards the exhaustion of domestic remedies, counsel submitted that it was incomprehensible that the criminal proceedings against Inspector J.J. had not yet been

concluded. He contended that the proceedings were unreasonably prolonged and indicated that the delay appeared to be attributable to the fact that the State party had joined the author's case with other pending matters against Inspector J.J. Thus, the difficulties in obtaining the testimony of witnesses in the former Yugoslavia and Turkey, concerning another investigation, were postponing the investigation of the author's allegations. He contended furthermore that the courts had failed to examine the allegations of torture in a timely fashion, during the criminal proceedings against the author.

5.3 Concerning the possibility of an appeal to the Constitutional Court under section 144 of the Federal Constitution, counsel argued that this appeal was not available to the author, as this procedure applies to administrative, not to criminal law. Moreover, counsel argued that, even if this appeal were available, it would not constitute an effective remedy, as criminal courts are not bound by the evaluation of evidence in the Constitutional Court.

5.4 Concerning the State party's contention that article 15 of the Convention had not been violated, counsel submitted that it is not clear from the text of article 15 how it should be established that a statement is made as a result of torture. He argued that it is sufficient that the author adduces some evidence indicating that a statement was given as a result of torture. In this connection, he referred to the difficulty for a victim to prove that he has been subjected to torture, owing to the isolation in detention and the absence of independent witnesses during interrogation. He further stated that article 15 applies to "any statement", not only to confessions or false statements, as the State party seemed to imply. He finally argued that it could not be said that the author's allegations were examined by the jury during his trial, as Inspector J.J. was not questioned on the issue, nor confronted with witnesses.

Committee's admissibility decision

6.1 At its eighth session, the Committee considered the admissibility of the communication. It ascertained that the same matter had not been or was not being examined under another procedure of international investigation or settlement, and that a case concerning the author which was pending before the European Commission of Human Rights concerned a different matter.

6.2 The Committee further considered that article 22, paragraph 5 (b), of the Convention did not, in the circumstances of the case, preclude the Committee from considering the communication on the merits. In this context, the Committee considered that there had been an unreasonable delay in the conduct of investigations into the author's allegations of torture, which were made in December 1988, and that no further effective remedies appeared to be available.

7. On 5 May 1992, the Committee therefore declared the communication admissible. It noted that the facts as presented by the author might raise issues under articles 12 and 15 and also under other provisions of the Convention.

State party's submissions on the merits and the author's comments

8.1 The State party, on 10 November 1992 and 4 January 1993, reiterates that the author made his complaint of ill-treatment months after its alleged occurrence. It submits that the author has suffered from eye trouble since childhood and that the medical records show that he complained about his left eye for the first time on 16 September 1988. As a result of examinations by the prison doctor on 14 November 1988, aphakia (the absence of the lens of the eye) and ablatio retinae (detachment of the retina) were found. Subsequently, after examinations at the Vienna Eye Hospital it was concluded that the author's left eye was blind. The State party forwarded a copy of the medical record in the author's case.

8.2 With regard to the investigations into the author's allegations, the State party states that the criminal proceedings against Inspector J.J. and a colleague were halted by the Prosecutor's office on 6 November 1992, on the ground that following preliminary investigations the allegations were found to be totally unsubstantiated. At the preliminary hearing, the interpreter who had been present during the interrogations testified that the conduct by the police officers had been correct and that she had never witnessed any acts of torture. Only two witnesses, both co-defendants of the author, claimed to have been given one or two blows by Inspector J.J. All other witnesses gave exonerating evidence. No medical evidence was available to substantiate the allegations.

9.1 In his comments on the State party's submissions, counsel maintains his claim that the author's eye injury was caused by Inspector J.J. at the end of June or the beginning of July 1988, when the author was hit with a pistol and his head was banged against a table.

9.2 Counsel further claims that some witnesses, who could have corroborated the author's allegations, were not called by the Prosecutor during the preliminary investigations against Inspector J.J. Among these persons is the author's wife, who no longer lives in Austria.

10. On 26 April 1993, the Committee decided to request the State party to appoint, in consultation with the author's counsel, an independent expert in ophthalmology in order to determine the date of and the origin of the eye injury. It further referred to article 12 of the Convention and requested the State party to submit written explanations clarifying the delay in initiating the investigation of the author's allegations.

11.1 On 27 July 1993, the State party forwarded to the Committee an expert opinion prepared by an ophthalmologist. His report shows that the author's eye was already blind in March 1989, when he was first examined at the Eye Hospital, as a result of an old retinal detachment and that it had begun to show the first signs of an external squint. The State party concludes that the eye must have gone blind before 1988, since a blind eye does not begin to squint until after a long period of blindness.

11.2 The State party recalls that the author was arrested on 19 April 1988 on the suspicion of being involved in internationally organized heroin trafficking. On 5 December 1988, the author for the first time claimed to have been subjected to torture and threatened by Inspector J.J. Neither the **Journalrichter** nor the investigating judge had observed any signs of ill-treatment. The author repeated his allegations in a number of written submissions to the Public Prosecutor, the Attorney General and the Minister of Justice. Police Inspector J.J.

and one of his colleagues were questioned on these charges by the investigating judge on 16 February 1989; they rejected the accusations made against them.

11.3 The State party submits that, since no signs of an injury could be established and the police officers denied the charges, no strong suspicion existed that an act of torture had been committed. It was therefore decided that the criminal proceedings against the author could proceed. During the trial against the author, from 8 to 11 January 1990, witnesses testified that they had been ill-treated by Inspector J.J. and his colleague. As a result, preliminary investigations against the two policemen were instituted on 5 March 1990.

12. In his comments on the State party's submission, dated 21 October 1993, counsel submits that the State party had not consulted him about the choice of the medical expert. He further states that the expert's report does not necessarily exclude the author's version of events. He emphasizes that the author received medical treatment in prison after having been ill-treated but that the records of this treatment were not kept.

Examination of the merits

13.1 The Committee has considered the communication in the light of all information made available to it by the parties, as required under article 22, paragraph 4, of the Convention.

13.2 The Committee notes that the author has claimed that he was ill-treated after his arrest and that as a consequence he suffered an eye-injury. The State party has denied the alleged ill-treatment and has claimed that the author's eye-injury dates from childhood. It has submitted an expert report, in which it is concluded that the author's left eye, with almost absolute certainty ("**mit an Sicherheit grenzender Wahrscheinlichkeit**") had been completely blind already in 1988, owing to retinal detachment.

13.3 The Committee observes that the competence, independence and conclusions of the specialist in ophthalmology have not been challenged. While noting with regret that the State party failed to consult with the author's counsel before appointing the specialist, as the Committee had requested in its decision of 26 April 1993, due weight must be given to his conclusions.

13.4 On the basis of the information before it, the Committee cannot conclude that the allegations of ill-treatment have been sustained. In the circumstances, the Committee finds no violation of article 15 of the Convention.

13.5 It remains to be determined whether the State party complied with its duty to proceed to a prompt and impartial investigation of the author's allegations that he had been subjected to torture, as provided in article 12 of the Convention. The Committee notes that the author made his allegations before the investigating judge on 5 December 1988. Although the investigating judge questioned the police officers about the allegations on 16 February 1989, no investigation took place until 5 March 1990, when criminal proceedings against the police officers were instituted. The Committee considers that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance

with the requirement of article 12 of the Convention.

14. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts before it disclose a violation of article 12 of the Convention.

15. The State party is requested to ensure that similar violations do not occur in the future.

16. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee wishes to receive information, within 90 days, on any relevant measures taken by the State party in conformity with the Committee's Views.

[Adopted in English, French, Russian and Spanish, the English text being the original version.]