COMMITTEE AGAINST TORTURE

Blanco Abad v. Spain

Communication No 59/1996

14 May 1998

CAT/C/20/D/59/1996

VIEWS

Submitted by: Encarnación Blanco Abad (represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 12 February 1996

Date of decision on admissibility: 28 April 1997

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

Meeting on 14 May 1998,

Having concluded its consideration of communication No. 59/1996, submitted to the Committee against Torture by Mrs. Encarnación Blanco Abad under article 22 of the Convention,

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

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Encarnación Blanco Abad, [1] a Spanish citizen. She claims to be the victim of violations by Spain of articles 12, 13 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is

represented by counsel.

The facts as submitted by the author

2.1 The author was detained along with her husband, Josu Eguskiza, on 29 January 1992 by officers of the Guardia Civil for alleged involvement in activities on behalf of the armed gang ETA. She alleges that she was mistreated between 29 January and 2 February 1992, when she was kept incommunicado under anti-terrorist legislation.

2.2 Brought before Madrid Court of Criminal Investigation No. 44 for preliminary investigation No. 205/92 on 13 March 1992, the author described the mistreatment and torture to which she had been subjected while in the custody of the Guardia Civil. The preliminary investigation had been instituted by the court upon receiving, from the Director of Carabanchel Women's Penitentiary Centre, the report of the doctor who had examined the author and observed bruises upon her entry into the Centre on 3 February 1992.

2.3 On 2 February 1993 the court ordered a stay of proceedings, not considering the incident reported to be a penal offence. Following an appeal, Court No. 44 granted permission on 13 October 1994 to continue with criminal proceedings. The judge handed down an order dated 4 April 1994 to shelve proceedings definitively. The Provincial High Court confirmed this decision by order dated 5 September 1995. An application for remedy of *amparo* filed with the Constitutional Court against the Provincial High Court's order was dismissed on 29 January 1996.

State party's observations on the admissibility of the communication

3.1 In its submission of 17 January 1997, the State party pointed out that since 3 February 1992 Mrs. Blanco Abad had been assigned up to seven lawyers to represent and defend her. Despite this, Mrs. Blanco Abad had not formally reported any mistreatment. It submitted that the legal proceedings were set in train by the official transmission to the court of the report of the medical check-up on the author conducted when she entered the Madrid Penitentiary Centre on 3 February 1992. That is, the only legal investigations of alleged mistreatment were instituted not in response to a report by the individual concerned, nor by her family, nor by any of her seven lawyers, but rather as the result of an official procedure enshrined in the regulations to safeguard human rights. Not until 30 May 1994, two years and three months after the event, did the author send a written communication to Court of Investigation No. 44 designating three legal representatives.

3.2 The State party admitted that, with the decision of the Constitutional Court on 29 January 1996, all domestic remedies had been exhausted.

3.3 In reference to article 13 of the Convention, the State party confirmed that by letter of 9 September 1994, Mrs. Blanco Abad's counsel had appealed against the stay of the officially instituted investigations. On 13 October 1994 Court No. 44 annulled the stay of proceedings, allowing them to continue, and called for an expert report to be prepared. Mrs. Blanco Abad did not appeal against the examination authorized; neither did she insist on

other investigations. The medical examiner submitted his report on 22 November 1994. On 4 April 1995, Court No. 44 issued an order which gave a detailed account of the medical tests conducted and concluded with the decision to shelve the proceedings definitively.

3.4 The State party submitted that from 9 September 1994, when Mrs. Blanco Abad applied in writing for the stay to be revoked, up to the aforementioned order to shelve the case definitively, the record shows not a single written communication from Mrs. Blanco Abad calling for an investigation or presenting any evidence.

3.5 On 19 April 1995, Mrs. Blanco Abad applied for reconsideration of the earlier decision to shelve the proceedings. On 19 May 1995 Court No. 44 turned the application down. On 5 September 1995 the Provincial High Court in Madrid also rejected the appeal. On 6 October 1995 Mrs. Blanco Abad applied for a remedy of *amparo* before the Constitutional Court, emphasizing the subjective evaluation of the medical examinations. The Constitutional Court considered the judicial decisions in question and pronounced them well-founded, with reasoning that could "not be challenged as manifestly unreasonable or arbitrary".

3.6 The State party pointed out that less than 15 months had elapsed between the reopening of the investigation and the Constitutional Court's decision. The investigation had been reopened for six months, and during those six months Mrs. Blanco Abad neither took any action nor submitted anything at all in writing. The remaining nine months were taken up with the application for reconsideration, the appeal before the High Court and the *amparo* proceedings before the Constitutional Court.

3.7 For the above reasons, it was submitted that Mrs. Blanco Abad's representations, over two years after the event, in investigations instituted in response to an official act, had been promptly and impartially examined. The State party therefore submits that no violation of article 13 of the Convention has occurred.

Comments by the author

4.1 In her comments on the State party's submission, the author stated that by decision of the National High Court dated 26 December 1995, she was sentenced to seven years' ordinary imprisonment and a fine. The judgement observes:

"The defence initially sought annulment and suspension of the judgement on the grounds of the torture undergone by the accused during detention and while being held at the police stations. The Criminal Division, in view of the abundant and always detailed testimony offered not only by the accused but also by the witnesses called, acknowledges that this might have occurred. Hence its decision to take no account of the statements to the police, which are invalid."

4.2 The author argued that the only evidence against her were the pleas entered by two co-defendants, her husband, Mr. Josu Eguskiza, and Mr. Juan Ramón Rojo, which incriminated her, and that, notwithstanding the view of the National High Court, which found them valid,

they were obtained by means of mistreatment and torture, and stemmed directly from the statements to the police that had been declared void.

4.3 The author indicated that on 2 February 1992, she made a statement to the investigating magistrate without being able to consult a lawyer, not even the duty counsel, and that although the official record mentioned the lawyer designated by her, he was not able to attend until the accused's statement had been finalized. The record showed that, responding to the first question put to her, she "neither said nor confirmed in her statement to the Guardia Civil", that she belonged to or had collaborated with ETA. She also related that while on Guardia Civil premises she was mistreated. In particular, she said she had been struck with a telephone directory, had a bag put over her head and electrodes on her body, had been forced to undress and had been threatened with rape. She also claimed to have been forced to stand for long periods against a wall with her arms raised and legs apart while being struck from time to time about the head and genitals, and receiving all manner of insults.

4.4 The author submitted that the medical examinations she underwent while detained incommunicado were superficial checks, and that not even her vital signs were measured. There was no assessment of her nervous state, and she was not asked about the kind of threats and insults to which she had been subjected; the conclusion was that she bore no signs of violence. The doctor put in her report that the detainee reported not having slept, having been beaten, and having been forced to remain naked. Despite this, she concluded that the author was in a suitable physical and mental condition to make a statement. Only on 3 February 1992, in prison, the author said, was any medical evidence of maltreatment found on her person, when three bruises were discovered. In this connection, the author refers to a June 1994 report by the European Committee for the Prevention of Torture illustrating the superficiality of the reports drawn up by doctors attached to the National High Court.

4.5 The author stated that there was no impartial and independent inquiry during the conduct of the preliminary investigation, which was instituted as a result of what she had told the doctor at the penitentiary centre. The three specialized medical reports ordered by the court were clearly at odds over the dating of her bruises by their colour (between four hours and six days), which was crucial to the outcome of the inquiry. She said that no statements were taken from those who might have been responsible for the alleged offence.

4.6 The only investigation that was done after the partial retraction of the stay of proceedings ordered as a result of the remedy filed by the author on 9 September 1994 took the form of a third specialized report by the medical examiner attached to the Court of Investigation on whether the mistreatment alleged by the author would have left traces that could be detected by a doctor on examination, hours or days later. This last medical report, dated 22 November 1994, stated that "the acts of aggression reported should have left objectively observable injuries in the parts of the body allegedly concerned, particularly the scalp and the genitals, unless the injuries were extremely slight. When a person is beaten unconscious, there will very probably be subsequent injuries, not only to the back and shoulders but to other areas as well." This opinion, combined with the National High Court doctor's lack of rigour in estimating the date of her injuries, led the court to declare the case definitively shelved.

4.7 The author pointed out that the shelving order referred to the impossibility of furnishing proof of any of the acts of aggression recounted, which included blows to the head, kicks to the genitals, hair-pulling and loss of consciousness. She emphasized that the kinds of violence she related do not leave physical marks on the victim, and that neither any of the kinds of psychological and sexual torture she alleged, nor most of the physical torture ("bagging", "hooding" and low-voltage electric shocks), leaves external signs of injury on the body. She submitted that, while a victim's testimony was not in itself always enough to secure a conviction, it was nonetheless true that such testimony, in cases where objective tests were not possible and there was no reason to doubt its veracity, had sufficed in many instances to bring in a guilty verdict when the following stipulations had been met: absence of reasonable doubt, verisimilitude corroborated by circumstantial evidence, and consistency in the charges. She stressed that no statements were taken from the officers on guard, and that the person who had shared the cell with her while she was being held incommunicado had not even been called as a witness to describe how she had been held in custody.

4.8 The author concluded that there had been breaches of articles 12 and 13 of the Convention against Torture. She submitted that current "anti-terrorist" legislation encouraged torture, infringing the basic right to counsel, hampering the collection of evidence that torture had been employed and, ultimately, guaranteeing that torture would go unpunished. In her view, that legislation runs counter to the spirit of article 2 of the Convention against Torture.

4.9 She also submitted that the action taken against her on account of her presumed involvement with an armed gang served to show that the only evidence against her was that obtained under torture and duress from Mr. Eguskiza and Mr. Rojo, in breach of article 15 of the Convention against Torture.

The Committee's decision on admissibility

5.1 At its eighteenth session the Committee considered the admissibility of the communication and ascertained that the same matter had not been, and was not being, examined under another procedure of international investigation or settlement. It observed that the State party had raised no objection regarding admissibility and considered that the available domestic remedies had been exhausted.

5.2 The Committee considered that the communication might raise issues under articles 12 and 13 of the Convention, notably in relation to the period of over a month that elapsed between when the court received the medical report and when it heard the author, and what the court was doing during the almost 11 months that separated the author's statement from the stay of proceedings.

5.3 As to the author's allegation that her conviction violated article 15 of the Convention, the Committee noted the comment in the judgement of the National High Court that the statements made to the police by the accused (including the author) had not been taken into consideration because of the possibility that torture had been used. The author's convention was based on other, uncompromised, voluntary statements made when the accused had been

accompanied by counsel of their own choosing. In the circumstances, the Committee found that the author's claim of a violation of article 15 lacked the requisite corroboration, rendering it incompatible with article 22 of the Convention.

5.4 The Committee therefore decided that the communication was admissible inasmuch as it raised issues relating to articles 12 and 13 of the Convention.

Submission of the State party on the merits

6.1 In a submission of 10 November 1997 the State party reiterated that, although the author had been assisted by seven lawyers in the proceedings against her, not a single complaint or report of maltreatment had been presented via the domestic means of redress and that Court No. 44 had initiated the investigation without any application from the individual concerned, who was not even represented in court as an interested party when the compulsory offer of recourse was made to her. This attitude on the part of the author was curious since at the same time she reported the alleged maltreatment to several international bodies. From 9 September 1994, the date on which she requested the revocation of the stay of proceedings, until 4 April 1995, when the shelving order was made, the author did not request any investigation or produce any evidence. Her report of alleged maltreatment was inconsistent with this passive behaviour - not taking any action via the domestic means of redress, not being represented as a party directly involved in the official investigation, and reactivating an investigation but taking no part in it for six months.

6.2 The State party submitted, with respect to article 13 of the Convention, that insofar as this article refers to the right to complain, its application in the present case would be limited to the period beginning with the author's representations to Court of Investigation No. 44 following the order for a stay of proceedings, representations which marked the reopening of the investigation. Less than 15 months elapsed between the reopening of the investigation and the decision of the Constitutional Court. The investigation was in progress for six of these months, and during theses six months the author, assisted by lawyers, did not submit a single document to the Court and did not produce or propose any evidence. In the remaining nine months after the shelving order, the applications to the Court of Investigation, the Provincial High Court and the Constitutional Court were submitted, heard and ruled upon. Accordingly, the State party did not fail to fulfil its obligations under article 13 of the Convention.

6.3 With regard to article 12 of the Convention, the State party submitted that the Spanish system of protection against maltreatment has procedures for safeguarding that right, including in cases, such as the present one, when the party concerned takes no action. When the author entered the Penitentiary Centre on 3 February 1992, she was given a medical examination. The findings of this examination reached the High Court of Madrid on 13 February for distribution. On 17 February they were delivered to Court of Investigation No. 44. On 21 February Court No. 44 issued an order to begin a preliminary investigation and sent an official letter to the Director of the Penitentiary Centre ordering the author to appear on 7 March. She did not appear on that date, and on 9 March a new summons was issued for 13 March. On 13 March the author made a statement and the offer of recourse was made to

her. On that same date the Judge authorized an application to Central Court of Investigation No. 2 of the National High Court for official copies of the records of the medical examinations carried out by the forensic medicine staff of that Court. On 30 April, when these copies had still not been received, the Judge sent an urgent reminder. The papers were delivered on 13 May. On 2 June the Judge requested the medical examiner of her Court to make a report; this report was delivered on 28 July. On 3 August the Judge summoned the medical examiner who had attended the author during her detention. On 30 October the Judge set the date of 17 November for receipt of the statement of the medical examiner and also authorized an application for information from the Penitentiary Centre about the time at which the author had been examined and the development of the injuries. On 23 December the Penitentiary Centre delivered the requested information. On 2 February the Judge issued the shelving order.

6.4 These facts show that there was no tardiness or delay in the conduct of the investigation. At no time did the author complain through the domestic channels about delays in the preliminary investigation, either before or after the temporary shelving order, once she had become represented in the proceedings.

Comments by the author

7.1 In her comments on the State party's submission, the author maintains that in the five forensic examinations she underwent during the more than 100 hours for which she was held incommunicado she indicated that she had been subjected to maltreatment. The author encloses copies of the five medical reports which were prepared. In the first it is stated that "she does not mention physical ill-treatment, although she was kept hooded for many hours". According to the second, "she does not mention physical ill-treatment although does speak of threats and insults". In the third "the person concerned says that she is very nervous, has not slept and has not received food. She mentions having received ill-treatment consisting of blows to the head, but there are no signs of violence". The fourth says that "she mentions ill-treatment consisting of blows, but there are no signs of violence". In the fifth "she mentions ill-treatment consisting of blows and of having been kept undressed. No signs of violence are apparent upon examination".

7.2 In her statement to Court of Investigation No. 2 of the National High Court on 2 February 1992, the author spoke of having sustained many blows, having had a bag put over her head until she nearly suffocated, of the use of electrodes, threats and insults, and of having been forced to undress. Notwithstanding, the judge did not automatically arrange for the competent judicial authorities to investigate the complaints.

7.3 The action of Court of Investigation No. 44 consisted in issuing various instructions for the medical reports on the examinations carried out during the period of incommunicado detention, as well details of the examination conducted in prison, to be entered in the record. In addition, two expert appraisals were obtained on 28 July and 20 November 1992, respectively. The first was by the forensic physician of the examining court and the second by the official forensic expert of Court of Investigation No. 2.

7.4 The author indicated that the forensic reports made available by Court of Investigation No. 2 did not include the one for 31 January 1992, which is not to be found in the record and has therefore not been appraised by the experts. The judicial proceedings also failed to determine the exact time of the prison medical examination on 3 February, although the certificate sent by the penitentiary centre to the author's counsel suggests that it took place in the morning.

7.5 The order definitively shelving the proceedings states that "it is necessary to establish, on the one hand, the impossibility of furnishing proof of any of the acts of aggression recounted by the complainant, i.e. blows to the head, the placing of a plastic bag over the head, kicks to the genitals, hair-pulling and loss of consciousness, since they were not confirmed in any medical examination and yet should have left some kind of palpable injury, according to the forensic medical report, and, on the other hand, the existence of other injuries as described for the first time in the medical report of 3 February". It also indicates that it is not possible to reach any conclusion regarding whether the cause of the injuries described "was accidental, intentional or self-inflicted, since the three possibilities are compatible with the objective findings, and the statement of the complainant, which constitutes the other source of information, is not supported by the chronology of the injuries established by the existing medical reports. In view of the impossibility of establishing the cause of the injuries, no offence can be said to have been committed and the proceedings must therefore be shelved".

7.6 This decision was challenged in an appeal based, among other things, on the following arguments:

- With regard to virtually all the acts of aggression described by the author (blows to the head, kicks to the genitals, hair-pulling and loss of consciousness), it was argued that these involved the use of methods intended to leave no physical marks on the victim. Neither the alleged forms of psychological or sexual torture, nor most of the physical torture ("bagging", "hooding" and low-voltage electric shocks) left external signs of injury on the body;

- With regard to the dating of the various bruises, the complainant adduced the theory put forward by the first expert, defining two of them as between two and six days old, while the other two were said to be more recent. The fact that the bruises had not been detected earlier could have been due to a defective physical examination or to the poor light;

- With regard to the value of the victim's testimony considering the lack of objective evidence, reference was made to the case law of the Supreme Court, according to which account should be taken of the absence of reasonable doubt, verisimilitude corroborated by circumstantial evidence, and consistency in the charges. Furthermore, in the course of the police raid on 29 January 1992 many detainees complained of ill-treatment to the forensic physician and the examining magistrate. The complainant therefore called for statements to be taken from the person with whom she had shared a cell while in detention, as well as from the officers on guard.

7.7 On 5 September 1995 the Provincial High Court dismissed the appeal. On 28 September

1995 the author made an application for *amparo* to the Constitutional Court as she considered that the Provincial High Court's decision violated articles 15 (right to physical and moral integrity) and 24 (right to the protection of the courts) of the Constitution, the latter on the ground of failure to allow the submission of evidence proposed by the author, namely, a statement by the prison doctor who noted the injuries and statements by the members of the Guardia Civil responsible for custody.

7.8 On 29 January 1996 the Constitutional Court rejected the application for *amparo*, holding that "the right to bring an action at law does not in turn imply an absolute right to the institution and full conduct of a criminal proceeding, but entails only the right to a reasoned judicial decision on the claims made, which may well be to stay or dismiss the proceedings or, indeed, to declare the complaint inadmissible".

Examination of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

8.2 The committee observes that, under article 12 of the Convention, the authorities have the obligation to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion. Article 12 also requires that the investigation should be prompt and impartial. The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.

8.3 The Committee observes that when she appeared before the National High Court on 2 February 1992, after having been held incommunicado since 29 January, the author stated that she had been subjected to physical and mental ill-treatment, including the threat of rape. The Court had before it five reports of the forensic physician attached to the National High Court who had examined her daily, the first four examinations having taken place on Guardia Civil premises and the last on the premises of the National High Court prior to the above-mentioned court appearance. These reports note that the author complained of having been subjected to ill-treatment consisting of insults, threats and blows, of having been kept hooded for many hours and of having been forced to remain naked, although she displayed no signs of violence. The Committee considers that these elements should have sufficed for the initiation of an investigation, which did not however take place.

8.4 The Committee also observes that when, on 3 February, the physician of the penitentiary centre noted bruises and contusions on the author's body, this fact was brought to the attention of the judicial authorities. However, the competent judge did not take up the matter until 17 February and Court No. 44 initiated preliminary proceedings only on 21 February.

8.5 The Committee finds that the lack of investigation of the author's allegations, which were

made first to the forensic physician after the first examination and during the subsequent examinations she underwent, and then repeated before the judge of the National High Court, and the amount of time which passed between the reporting of the facts and the initiation of proceedings by Court No. 44 are incompatible with the obligation to proceed to a prompt investigation, as provided for in article 12 of the Convention.

8.6 The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.

8.7 The Committee notes, as stated above, that the author's complaint to the judge of the National High Court was not examined and that, while Court No. 44 examined the complaint, it did not do so with the requisite promptness. Indeed, more than three weeks passed from the time that the court received the medical report from the penitentiary centre on 17 February 1992 until the author was brought to court and made her statement on 13 March. On that same date the court called for Section 2 of the National High Court to provide the findings of the medical examinations of the author by the forensic physician of that court, but more than two months elapsed before on 13 May they were added to the case file. On 2 June the judge requested the court's own forensic physician to report thereon, and this was done on 28 July. On 3 August the judge summoned the forensic physician of Court No. 2 who had conducted the said examinations. This physician's statement was taken on 17 November. On that same date the court requested the penitentiary centre to indicate the time at which the author had been examined in that institution and how the injuries had developed; this information was transmitted to the court on 23 December. Contrary to the State party's contention, as cited in paragraph 6.4, that there had been "no tardiness or delay in the conduct of the investigation", the Committee considers that the above chronology shows the investigative measures not to have satisfied the requirement for promptness in examining complaints, as prescribed by article 13 of the Convention, a defect that cannot be excused by the lack of any protest from the author for such a long period.

8.8 The Committee also observes that during the preliminary proceedings, up to the time when they were discontinued on 12 February 1993, the court took no steps to identify and question any of the Guardia Civil officers who might have taken part in the acts complained of by the author. The Committee finds this omission inexcusable, since a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein, as required by the State party's own domestic legislation (article 789 of the Criminal Procedure Act). Furthermore, the Committee observes that, when the proceedings resumed as of October 1994, the author requested the judge on at least two occasions to allow the submission of evidence additional to that of the medical experts, i.e. she requested the hearing of witnesses as well as the possible perpetrators of the ill-treatment, but these hearings were not ordered. The Committee nevertheless believes that such evidence was entirely pertinent since,

although forensic medical reports are important as evidence of acts of torture, they are often insufficient and have to be compared with and supplemented by other information. The Committee has found no justification in this case for the refusal of the judicial authorities to allow other evidence and, in particular, that proposed by the author. The Committee considers these omissions to be incompatible with the obligation to proceed to an impartial investigation, as provided for in article 13 of the Convention.

9. 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 reveal a violation of articles 12 and 13 of the Convention.

10. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any relevant measures taken by the State party in accordance with the Committee's views.

1/ An earlier communication submitted on behalf of the author and her husband (communication No. 10/1993) was declared inadmissible by the Committee on 14 November 1994 for failure to exhaust domestic remedies.

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