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or Degrading Treatment
or Punishment

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COMMITTEE AGAINST TORTURE
Thirty-second session
(3 – 21 May 2004)

DECISION

Communication No. 148/1999

Submitted by:	A. K.
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	13 October 1999 (initial submission)
Date of the decision:	5 May 2004

[ANNEX]

* Made public by decision of the Committee against Torture.

ANNEX

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-second session

Concerning

Communication No. 148/1999

Submitted by: A. K

Alleged victim: The complainant

State party: Australia

Date of complaint: 13 October 1999 (initial submission)

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

Meeting on 5 May 2004,

Having concluded its consideration of complaint No. 148/1999, submitted to the Committee against Torture by A. K. 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 complaint, his counsel and the State party,

Adopts the following:

Decision of the Committee Against Torture under article 22 of the Convention

1.1 The complainant is A. K., a Sudanese national, currently detained at the Immigration Detention Centre, New South Wales. He claims that his forcible return to Sudan would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by Australia. The complainant was initially represented by counsel.[1]

[1] On 20 March 2004, the author's representatives informed the Committee that they no longer represented the complainant.

1.2 On 1 November 1999, the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the complainant, while his complaint is under consideration by the Committee. On 20 January 2000, the State party confirmed that it would accede to this request.

Facts as presented by the complainant:

2.1 The complainant alleges that he is Ansari and a member of the Umma Party, which is one of the two traditionalist parties of the North opposing the current government. From 1990 to 1995, the complainant attended Cairo University, Khartoum Branch, where he completed a law degree. The Umma Party had about 100 members at Cairo University, and the complainant became the leader of this group.

2.2 In April 1992, the complainant alleges to have organised rallies and demonstrations against the government. Following one of these rallies, he was detained by members of the security forces. He was threatened, forced to sign an undertaking that he would not participate in political activities and then released. Following this incident, the security forces kept him under surveillance.

2.3 While he was attending university, the complainant alleges that students were compelled to join the People's Defence Force (PDF), the army of the ruling party, the National Islamic Front (NIF). To avoid conscription the complainant became a police officer, and from 1993 to 1995, he worked at the head office of the Khartoum prison administration and sometimes at Kober prison.

2.4 In 1994, the government sent students who were seen as troublemakers and opponents of the regime to fight in Southern Sudan. On 1 June 1996, the complainant allegedly received a summons stating that he had to report to the PDF within 72 hours as he had been chosen "to fulfill the duty of Jihad". As he did not want to fight against his own people or to clear mine fields, he

decided to flee the country. He was unable to use his passport because of the summons and therefore used his older brother's passport. After his departure the military allegedly visited his home.

2.5 On 10 December 1997, the complainant arrived in Australia without valid travel documents and was detained pending final resolution of his asylum claims. On 12 December 1997, he filed an application for a protection visa (refugee status) with the Department of Immigration and Multicultural Affairs (the DIMA). In support of his application, he submitted, inter alia, the following: a letter from the Umma party confirming his membership; a letter from the Commander of the Popular Forces to the Manager of the Department of Prisons to release the complainant and present himself to the PDF; and a statement from a member of the Australian Sudanese community who stated that she had no doubt that the complainant was a Sudanese citizen and belonged to a family known to be strong supporters of the Ansar group, which supports the Umma party.

2.6 On 5 January 1998, a delegate of the DIMA denied the complainant's application for a protection visa, finding that he was not a citizen of Sudan and that his claims lacked credibility. On 5 February 1998, the complainant sought administrative review of the delegate's decision before the Refugee Review Tribunal (the RRT). By decision of 7 July 1998, the RRT refused the complainant's application. The complainant lodged an application for judicial review with the Federal Court of Australia. On 25 August 1998, the Court remitted the application back to the RRT for a second determination.

2.7 On 25 November 1998, the newly constituted RRT denied the complainant's application. The matter was appealed to the Federal Court, at which the complainant was unrepresented. During the hearing, he said that the interpreter who had assisted him at the RRT hearing was inadequate and that he had been misunderstood. The hearing was adjourned so that the complainant could obtain legal representation. On 9 August 1999, the Federal Court dismissed the appeal. Several subsequent requests for Ministerial intervention were denied.

2.8 The complainant outlines the recent political history of Sudan and claims that there is a consistent pattern of gross, flagrant and mass violations of human rights. He refers, inter alia, to the adoption of a country resolution in April 1997 by the UN Commission on Human Rights, according to which human rights violations in Sudan included "extrajudicial killings, arbitrary arrests, detentions without due process, enforced or involuntary disappearances, violations of the rights of women and children, slavery and slavery-like practices, forced displacement of persons and systematic torture, and denial of the freedoms of religion, expression, association and peaceful assembly".

2.9 In January 1998, the UN Special Rapporteur on Sudan reported that the authorities, security forces and militia were responsible for a broad range of human rights violations. In April 1998, the UN Commission on Human Rights again expressed deep concern over continued serious human rights violations. For the fourth year running, the Commission recommended deploying human rights field officers to monitor human rights.

2.10 The complainant alleges that although much of the religious persecution has been directed against non-Muslims, the fundamentalist nature of the current regime is such that many Muslims, including the Sufis, are not free to practice their own brand of Islam under the NIF regime. The Ansar (consisting largely of Sufis) have been subjected to government control with the confiscation of their mosques. In addition, Muslim groups critical of the government continue to suffer harassment[2]. On the political level, the complainant submits that contrary Islamist political opinions, including centrist Islamic parties such as the Umma are not tolerated.

2.11 According to the complainant, there is evidence that military deserters will face torture and death. Amnesty International reported in April 1998 that:

[2] The complainant refers to Amnesty's Annual Report of 1999 in which it reported that those detained in 1997 included five Imams who were reported to have case doubt on the religious credentials of Hassan al-Turabi, Secretary General of the National Congress and ideological mentor of the Government.

"Scores of student conscripts died as hundreds of youths broke out of a military training camp at al-Ayfun near Khartoum. The authorities announced that more than 50 deserters had drowned trying to cross the Blue Nile. However, other reports said that over 100 were killed, many of whom had been shot and others beaten to death." He also submits that both the UNHCR and Amnesty International have reported on the detention centres in Sudan and on the risk of ill-treatment and torture, in particular during interrogation in security offices[3]. According to the complainant, "a failed Sufi", Umma Party asylum seeker, who has spent considerable time in the West, and who has qualified in law, whether or not his military service has been completed, would face considerable difficulty on return to Sudan.

The complaint:

3. A. K. claims that his forced repatriation to Sudan would violate his rights under article 3 of the Convention, as there are substantial grounds for believing that he would be in danger of being subjected to torture. In support of his claim, he argues that his religion, his prior political activities, and the fact that he is a military deserter, puts him at a real personal risk of being subjected to torture. That he fled the country to avoid conscription would expose him subject to a threat of execution on return. Finally, he claims that if he were sent back he would be required to serve with the PDF and would be forced to fight against his will in the civil war.

The State party's submission:

4.1 By submission of 7 November 2000, the State party contests the admissibility and merits of all aspects of the complaint. On admissibility, the State party submits that the complainant has failed to substantiate his claim, misinterpreted the scope of its obligation under article 3, and failed to establish a substantial and personal risk of torture.

[3] He refers to Amnesty International's Urgent Action 21 January 1997.

4.2 The State party invites the Committee to decide that findings of fact by domestic bodies, that are relevant to the assessment of risk under article 3, will be accepted by the Committee unless there is clear evidence of manifest arbitrariness, injustice or a violation of judicial independence or impartiality. It submits that the interpretation and application of domestic law is primarily a matter for national courts and generally not appropriate for review by the Committee. It further argues that the RRT is independent and experienced in the review of Sudanese citizens' applications, having received 21 applications from Sudanese nationals in 1997 and 1998. Of the 8 applications that were heard and determined among the 21 applications made, the RRT set aside the decision of the immigration authorities to refuse a protection visa in the majority of cases (5), and affirmed the decision in 3 cases. In this case, the complainant had the benefit of two separate hearings before the RRT. His legal representative was present during both hearings and he was assisted by a professional interpreter on each occasion. The State party notes that the complainant has not provided the Committee with any new country information that was not also available to, and considered by, the RRT.

4.3 The State party submits that the evidence supporting the allegation of torture lacks credibility and accordingly a prima facie case has not been established. In the course of questioning by the RRT, the complainant made inconsistent statements concerning three significant issues. Firstly, he significantly changed his evidence regarding previous experiences with the Sudanese authorities. On arrival at Sydney airport and when asked whether he was threatened with physical violence by the Sudanese authorities, he answered "Yes". However, when asked, "In what form?", he changed his response to, "No, I have not been threatened". He then became uncooperative with the interpreter.

4.4 When interviewed by the DIMA, the complainant asserted that he had told the interpreter at the airport that he had been threatened with, "cutting finger nails, and also hitting the chest - like burning ... removing the fingernails," but that he had not been tortured. He also claimed to have been threatened with these forms of torture in his supporting statement for his protection visa

application, prepared between the airport and DIMA interviews with the assistance of a legal representative. In the State party's view, his explanation that the interpretation and /or transcription of his airport interview was inadequate is unconvincing.

4.5 Secondly, the complainant made contradictory statements about the acquisition of the passport he used to enter Australia and his use of passports generally. The complainant continued to make inconsistent statements on this issue throughout the procedure to such an extent that the delegate of the DIMA could make no finding as to his identity or nationality. The State party sets out in detail the contradictions in the complainant's evidence, including one statement that he obtained his passport in the market place from a man he did not know and to whom he paid nothing, another that he used his brother's passport to leave Sudan and travel through Chad, Libya, Malta, Malaysia and Singapore over a period of two years, and yet a third contradiction that it was an official passport but it contained wrong information.

4.6 Thirdly, the State party invokes the complainant's lack of credibility concerning his claimed political activities and the interest of the Sudanese authorities therein. His evidence about his political involvement vis-à-vis his employment was implausible, contradictory and became increasingly convoluted over time. During the DIMA interview, the complainant described his main task as guarding either the prison or administration building and ensuring that there were no illegal entries. In the 2nd RRT hearing, he claimed he transmitted letters between political prisoners and their families, without explaining how he had contact with the prisoners when his job was to act as sentinel at the external entrance to the buildings. He also claimed in this hearing that this transmission service operated successfully because the prisoners had an "instinctive...sense", that he had sympathetic political aims.

4.7 The State party submits that there is a lack of detail concerning, and independent corroboration of, the ill-treatment allegedly experienced by the complainant at the hands of the Sudanese authorities. The complainant only once provided the details of the one incident of alleged physical ill-treatment referred to in paragraph 4.4. Even if this claim was credible, mere threats of

physical violence by the Sudanese authorities: arrest and interrogation; and a house-search followed by low-level surveillance for a short period do not constitute harm amounting to severe pain or suffering. There is no evidence that the complainant suffered actual physical harm.

4.8 With respect to the alleged rally itself, the State party submits that it has been unable to find any information referring to such a rally in April 1992. Given that it is the only public political event that the complainant alleges to have been involved in, the failure of either his representatives or the State party to uncover any evidence of it seriously undermines the credibility of his claim. The complainant attempted to play down the scale of this rally when asked to explain why there was no independent evidence that it had taken place.

4.9 With respect to the evidence provided to corroborate the complainant's claim that he was politically active in the Umma Party, the evidence produced by him in the form of a fax from the London branch was rejected by the RRT for its low probative value. There is no information in the fax that demonstrates any knowledge of the complainant personally, beyond stating that he is a party member, and simply makes general statements about the persecution of Umma members in Sudan. A letter from the National Democratic Alliance (Sudan) Australia Branch (NDA), dated 5 February 1998, addressed "to whom it may concern" similarly displays a lack of specific knowledge of the complainant's circumstances or background. It refers to him only once, describing him as "a political activist [who is] committed and opposing to [sic] the Government of Sudan since June 30, 1989, when the Democratic Government was overthrown". As the RRT Member noted in the reasons for her decision, the complainant never claimed to either DIMA or the RRT that he was a political activist from the time of the coup. In fact, at the second RRT hearing, he claimed that he had been active only in 1992 and 1993.

4.10 The State party notes that the evidence given both orally and in writing to the RRT, a member of the local Sudanese community, whom the complainant met for the first time in Sydney, is of equally doubtful probative value. She

stated at the first RRT hearing that she did not know the complainant in Sudan, but went to school with two of his cousins, and that she telephoned the London branch of the Umma Party to confirm his membership. While her claims may be true, the State party deems information about the level of generality she obtained from the London Umma branch to be less significant than the complete absence of documentary evidence from the complainant himself regarding his Umma membership and his alleged reputation as a political dissident. Her statement, if accepted, merely supports the complainant's claim that he is of Sudanese origin.

4.11 On the issue of the complainant's alleged conscientious objection, the State party submits that his evidence before the RRT regarding compulsory military service was contradictory and unconvincing and there is no independent corroborating evidence of his conscientious objection to the civil war. The State party sets out in detail the complainant's evidence on this issue to the 1st and 2nd hearing of the RRT, which differs in many respects. Significantly, the Member of the 2nd RRT did not accept his claims concerning his being called up for duty and did not except that the letter provided by the complainant as evidence that he had been called up to fight for the PDF was genuine The State party submits that the complainant provided no evidence that he would be treated as a deserter. Even if it were to assume that he is a conscientious objector and that he would be forced to participate in the civil war through non-discriminatory conscription, this does not amount per se to torture as defined in the Convention.

4.12 The State party submits that even if it were accepted that the complainant has either evaded the draft or deserted, there is little evidence to suggest that this would place him at risk of torture if he is returned to Sudan. Since the enactment of the new Sudanese Constitution in 1998, torture or execution carried out in any circumstances, including desertion, is illegal. Having carefully assessed the available information, the State party believes that the complainant would not face torture or execution as a result of avoidance of military service. Even if the complainant did face some form of sanction for his claimed "desertion", the available information indicates that he would be

classified as a draft evader rather than a deserter, and thus face a prison sentence of no more than 3 years.

4.13 The State party concedes that Sudan has a poor human rights record, and that both government and non-government forces continue to commit abuses of human rights. It notes the general findings of the Commission on Human Rights[4] that a failure of the united Inter-Governmental Authority on Development to consolidate the 1994 Declaration of Principles (DOP) agreed to by the Sudanese government and the warring factions resulted in the continuation of the conflict in the south. However, it argues that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country. Specific grounds must exist to indicate that the alleged victim is personally at risk of torture by removal. Such grounds must go beyond mere theory or suspicion.[5]

4.14 Even if the State party were to accept that the complainant is Sudanese and that he was arrested at a rally in April 1992, it does not accept that he belongs to a high-risk group. The complainant never practised as a lawyer, he is no longer a student and has not been politically active since April 1992. Moreover, he has been out of Sudan since 1996, from which time onward he has done nothing to raise a profile in Sudan. The complainant does not fit the description of a targeted "rank and file activist or student", nor that of a youth, student leader or lawyer who might be viewed as a political opponent and thus a target of torture by the government.[6] A UNHCR Sudan Update written in 1997 concludes that Umma and another opposition party, the Democratic Unionist Party, are outdated and that most young people do not pay attention

[4] Report of the into the situation of human rights in the Sudan, E/CN.4/1999/38/Add.1 (17 May 1999)
[5] The State party refers to the Committee's General Comment on article 3 and Mutombu v Switzerland, Case No. 13/1993.
[6] As referred to in the 1999 US Department of State Country Report on Human Rights Practices in Sudan.

to them. Neither of these sources supports the credibility of complainant's claims of belonging to Umma, or of his fear of torture.[7]

4.15 Finally, advice from Australia's Department of Foreign Affairs and Trade states that "it is not unusual for Sudanese nationals to remain outside Sudan for long periods, usually for economic reasons".[8] Information sought from other countries on conditions in Sudan and profiles of Sudanese refugee applicants indicate that while members of the Umma Party or Ansar are sometimes persecuted in Sudan, many persons claim to be party members. Consequently, it is necessary to verify the veracity of these declarations and the degree of personal commitment of the claimants.

4.16 As to whether the complainant would risk to be subjected to torture for having sought asylum in Australia, the State party submits that there is little evidence to support this possibility. According to the complainant's own evidence, on returning to Sudan his brother was arrested and interrogated as to where he had been and what he was doing outside Sudan when he returned, but was released unharmed after five days. The State party has been advised by the DIMA officer in Cairo that it is aware of Sudanese nationals who returned after fleeing Sudan following the 1989 coup, including nationals who were granted refugee status in Australia and who suffered no problems with the authorities on return to Sudan. The State party also refers to information from the Australian Department of Foreign Affairs and Trade from April 2000, which indicated that the Umma party and the Sudanese government were attempting to reconcile their differences.

Issues and proceedings before the Committee:

Consideration of admissibility

5.1 Before considering any claim contained in a complaint, the Committee

[7] Gerard Prunier, "Sudan Update: War in North and South", *UNHCR RefWorld-Country Information*, p.3
[8] DFAT CA500922 of 22 January 1998, CX27237

must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention that the same matter has not been, and is not being examined under another procedure of international investigation or settlement.

5.2 The Committee notes that the fact that domestic remedies are exhausted is not contested by the State party. The State party objects to admissibility on the grounds that the complainant has not established a prima facie case of a violation of article 3, but the Committee is of the view that the complainant has provided sufficient information in substantiation of his claim to consider his complaint on the merits. As the Committee sees no further obstacles to the admissibility of the complaint, it declares the complaint admissible and proceeds to its consideration on the merits.

Consideration on the merits

6.1 The Committee must decide whether the forced return of the complainant to Sudan would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (refouler) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. To reach its conclusion, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim, however, is to determine whether the individual concerned would personally risk torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot

be considered to be in danger of being subjected to torture in his or her specific circumstances.

6.2 In assessing the risk of torture in the complainant's case, the Committee notes the substantial inconsistencies in the complainant's evidence throughout the proceedings, highlighted by the State party, which, in this case, was considered in depth by the Refugee Review Tribunal on two separate occasions. It observes that the complainant has not explained nor given any reasons for these inconsistencies and notes paragraph 8 of its General Comment No 1, pursuant to which questions about the credibility of a complainant, and the presence of relevant factual inconsistencies in his claim, are pertinent to the Committee's deliberations as to whether the complainant would be in danger of being tortured upon return.

6.3 Concerning the allegations of political involvement and previous ill-treatment at the hands of the Sudanese authorities as grounds for fearing that the complainant would be subjected to torture on return, the Committee notes that even if it were to discount the abovementioned inconsistencies and accept these claims as true, the complainant does not claim to have been politically involved since 1992, and at no time during the domestic proceedings nor in his complaint to the Committee did he claim to have been tortured by the Sudanese authorities.

6.4 On the issue of his alleged desertion, the Committee notes that the State party did examine the letter, dated 1 June 1996, in which the complainant was allegedly drafted by the PDF, but considered it not to be genuine. The Committee considers that due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable. Even if the Committee were to consider that the complainant is a deserter or evaded the draft, he has not demonstrated that he would be subjected to torture upon his return to Sudan. The Committee observes that the State party considered a significant amount of information from various different sources before arriving at this conclusion.

6.5 The Committee notes the claim that if returned to Sudan, the complainant would be compelled to perform military service, despite the fact that he is a conscientious objector, and the implication that this would amount to torture, as defined by article 3 of the Convention. The Committee considers that the letter of 1 June 1996, the veracity of which has been challenged, as well as the complainant's allegation that opponents of the regime are called up to fight in the civil war, is insufficient to demonstrate that he either is a conscientious objector or that he would be drafted on return to Sudan. As with the other reasons for claiming a fear of torture on return, the State party's evaluation of the facts in this respect has not been shown to be unreasonable or arbitrary.

6.6 On the basis of the foregoing, the Committee considers that the complainant has not provided a verifiable basis to conclude that substantial grounds exist for believing that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Sudan, within the meaning of article 3 of the Convention.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the removal of the complainant to Sudan would not constitute a breach of article 3 of the Convention.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]
