



**Convention against Torture
and Other Cruel, Inhuman or
Degrading Treatment or
Punishment**

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Committee Against Torture
Thirty-fifth session
7 – 25 November 2005

DECISION

Communication No. 231/2003

Submitted by: Mr. S. N. A. W. et al. (represented by counsel, Mr. Bernhard Jüsi)

Alleged victim: The complainants

State Party: Switzerland

Date of complaint: 12 June 2003 (initial submission)

Date of present decision: 24 November 2005

[ANNEX]

*Made public by decision of the Committee against Torture.

Subject matter: Deportation of complainants to Sri Lanka

Procedural issue: N/a

Substantive issues: Non-refoulement

Articles of the Convention: 3

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-fifth session

Concerning

Communication No. 231/2003

Submitted by: Mr. S. N. A. W. et al. (represented by counsel, Mr. Bernhard Jüsi)

Alleged victim: The complainants

State Party: Switzerland

Date of complaint: 12 June 2003 (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 24 November 2005,

Having concluded its consideration of complaint No. 231/2003, submitted to the Committee against Torture by Mr. S. N. A. W. et al. 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 complainant,

Adopts the following:

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

1.1 The complainants are Mr. S. N. A. W. (first complainant), born on 6 February 1974, his sister P. D. A. W. (second complainant), born on 2 March 1964, and her daughter S. K. D. D. G. S. (third complainant), born on 30 December 1992. They are Sri Lankan nationals, currently residing in Switzerland and awaiting deportation to Sri Lanka. They claim that their forcible return to Sri Lanka would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since they would be at risk of being subjected to torture in Sri Lanka. The complainants are represented by counsel, Mr. Bernhard Jüsi.

1.2 On 20 June 2003, the Committee, through its Rapporteur on New Complaints and Interim Measures, transmitted the complaint to the State party and requested it, under Rule 108, paragraph 1, of its rules of procedure, not to return the complainants to Sri Lanka while their case was under consideration by the Committee. The Rapporteur indicated that this request could be reviewed in the light of new arguments presented by the State party. The State party acceded to this request by note of 12 August 2003.

The facts as submitted by the complainants:

2.1 In 1992, the first and second complainants' brother, a suspected JVP ("Janatha Vimukthi Peramuna") activist, was shot dead while taking a shower in the backyard of his house in Jayawadanagama, Battaramulla (Sri Lanka). Allegedly, the police refused to investigate the assassination. The police officer in charge of the case told the complainants that the bullets found in their brother's body belonged to a police gun. He was subsequently reassigned to another post. When the complainants insisted on a proper investigation, they were warned that it would be better for their own safety not to ask more questions. In 1993, the complainants' family moved to another town (Akkuressa), because of the pressure exercised on them by the authorities.

2.2 During the winter of 1994/1995, the second complainant's husband was arrested at the house of the complainants' family, after failing to return to service in the Sri Lankan Army at the end of his leave. The police denied that he had been detained and accused the complainants of hiding him. Unaware of her husband's whereabouts, the second complainant was subsequently harassed and allegedly almost raped by members of the security forces, which forced her to go into hiding.

2.3 The first complainant was arrested on 27 June 1995, without being informed of the charges against him, and detained at the Colombo Fort police post, from where he was transferred to Mahara prisons after one week. During his detention at Colombo Fort, he was interrogated several times about his brother-in-law and his deceased brother. He was allegedly subjected to torture every day, receiving blows with a stick on his feet, testicles and stomach.

2.4 Subsequently, charges of attempted armed robbery were brought against the first complainant, on the basis that he and two accomplices had attacked a man while the latter was exchanging money. He remained in detention until his release on 22 December 1995, on the condition that he would report to the police every other week. Due to his fear to be detained again he decided to leave the country together with the other complainants on 20 March 1997. On 8 April 1997, they arrived in Switzerland and applied for asylum.

2.5 On 12 November 1998, the Federal Office for Refugees (BFF) informed the second complainant that her husband had applied for asylum in Switzerland. The marriage between the second complainant and her husband was dissolved by divorce judgment of 5 October 1999.

2.6 On 8 December 1998, the BFF rejected the first complainant's asylum application, considering that the evidence for his release from prison, i.e. a bail receipt dated 21 December 1995, was forged, thus undermining the credibility of his claims,

in the absence of any other evidence such as an indictment, a judgment or a decision to discontinue criminal proceedings against him. In a separate decision, the BFF also rejected the second and third complainants' asylum claim, based on a) inconsistencies between the statements of the second complainant and her husband about the date of the latter's desertion from the army and about the time when both spouses lost contact; b) the fact that desertions from the Sri Lankan army were unlikely to lead to persecution of family members; and c) the fact that the second complainant left Sri Lanka before her husband, although he was at the center of the authorities' attention. The BFF did not consider that the complainants' brother's death in 1992 would still give rise to any persecution of the surviving family members. It ordered the complainants' removal from Switzerland, arguing that their Sinhalese ethnicity and the existence of an internal flight alternative in Sri Lanka minimized any risk of ill-treatment on return.

2.7 On 28 August 2000, the Asylum Appeals Board (ARK) dismissed the first complainant's appeal against the decision of the BFF. It rejected new evidence submitted by the first complainant (copy and translation of a document issued by Mahara prisons, confirming that he had been detained from 4 July to 22 December 1995; summons for a High Court hearing on 22 October 1998; and two warrants dated 9 December 1998 and 1 July 1999 with translations), arguing that, in the absence of the original, the copy of the confirmation from Mahara prisons only had very limited evidentiary value, that it was unusual for such a document to be signed by a prison warden, that the file reference on the summons and on the warrant dated 9 December bears no apparent link to the reference number of the proceedings, and that his address on both warrants referred to the town where he had lived prior to 1993, although the authorities must have known that he had moved to Akkuressa, where he was arrested in June 1995. The ARK considered that several inconsistencies undermined the credibility of the first complainant's claims: a) the contradiction between his initial statement before the immigration authorities that his mother had provided his bail and his statement during ARK proceedings that he would submit copies of recent summons of his *two* bailors; b) the fact that there was no need for the Sri Lankan authorities to arrest him under the pretext of a common criminal offense, if they suspected him of hiding his brother-in-law, given that sheltering a deserter would have been a sufficient basis for arrest under Sri Lankan law; and c) the fact that he did not leave Sri Lanka before March 1997, although he claims that since January 1996, he had feared to be re-arrested.

2.8 On 28 August 2000, the ARK also dismissed the second and third complainants' appeal, based on the same inconsistencies as the ones which had been identified by the BFF.

2.9 On 19 December 2002, the ARK dismissed the first complainant's extraordinary appeal. It rejected a certified copy dated 10 July 2000 of his indictment and the trial transcript of the High Court of Colombo as out of time, finding that this evidence should have been introduced during the appeal proceedings, given that the first complainant had sufficient time to obtain the document from his lawyer in Colombo. The new evidence would, in any event, not give rise to a *non-refoulement* claim, in the absence of a credible claim that the first complainant's indictment for robbery was intended to punish him for his brother-in-law's army desertion. Only in exceptional cases involving much more serious offenses than desertion were family members held

responsible for acts of their relatives in Sri Lanka. For analogous reasons, the ARK dismissed the second and third complainants' extraordinary appeal.

The complaint:

3.1 The complainants claim that the combined effect of their deceased brother's JVP membership; their efforts to initiate a proper investigation of his death; the torture experienced by, and the criminal proceedings pending against, the first complainant; the disappearance for several years of the second complainant's husband; as well as their long stay in Switzerland, where Sri Lankan opposition groups are traditionally active, would culminate in their exposure to a high risk of being subjected to torture upon return to Sri Lanka, in violation of article 3 of the Convention.

3.2 They submit that the first complainant's risk of being arrested is increased by the fact that he continues to face criminal proceedings in Sri Lanka, whereas the second complainant would run a high risk of sexual harassment and rape during police interrogation in Sri Lanka.

3.3 By reference to annual reports of Amnesty International, the U.S. Department of State and a report of the Commission on Human Rights, the complainants submit that torture and cruel, inhuman or degrading treatment are common occurrences in Sri Lanka.

State party's observations on admissibility and merits:

4.1 On 12 August 2003, the State party conceded the admissibility of the complaint. On 15 December 2003, it disputed that the complainants' removal would violate article 3 of the Convention, fully endorsing the findings of the BFF and the ARK and arguing that the complainants did not submit any new arguments to challenge the decisions of the BFF and the ARK. They failed to clarify the contradictions which undermined their credibility, to submit any medical evidence that would corroborate the alleged torture of the first complainant or its claimed after-effects, or to substantiate their participation in any political activities during their time in Switzerland.

4.2 Neither their deceased brother's membership in the JVP, which had been legalized as a political party, nor the second complainant's husband's desertion from the army, an offense that is no longer prosecuted since March 2003, would be tantamount to expose the complainants to a risk of persecution today. Besides, the complainants would not have been able to leave Sri Lanka by plane, had any of them been sought by the police, given the strict security measures at Colombo airport.

4.3 By reference to the Committee's jurisprudence, the State party submits that even if the first complainant faced criminal charges in Sri Lanka, the mere fact that he would be arrested and tried upon return would not constitute substantial grounds for believing that he would be at risk of being subjected to torture.

4.4 Lastly, the State party refers to the report¹ on the Committee's inquiry on Sri Lanka under article 20 of the Convention, finding that the practice of torture was not systematic in Sri Lanka. It concludes that the complainants cannot substantiate a real, present and personal risk of being subjected to torture upon return to Sri Lanka.

Complainant's comments:

5.1 On 16 January 2004, the complainants commented on the State party's observations, criticizing the rejection for late submission by the ARK of the first complainant's trial transcripts, despite their relevance for his risk of torture. While conceding that neither the desertion from the army of the second author's husband, nor the extrajudicial execution of the first and second complainant's brother were, as of themselves, sufficient to constitute a foreseeable, real and personal risk of torture for the complainants, the opposite was true of the combined effect of these and other elements, even if it were to be assumed that torture was not systematic in Sri Lanka.

5.2 The complainants submit that, despite the strong after effects of the first complainant's torture, he never consulted a medical doctor, but rather tried to suppress his traumatic experience. As regards their departure from Sri Lanka, they content that it was possible to leave the country with a forged passport.

5.3 The complainants request the Committee to proceed with an independent assessment of the authenticity of the documentary evidence and to grant the first complainant a personal hearing to witness his emotional distress when talking about his torture experiences.

Issues and proceedings before the Committee:

6. Before considering any claim contained in a communication, the Committee against Torture 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. In the present case, the Committee also notes that all domestic remedies have been exhausted and that the State party has conceded that the communication is admissible. It therefore considers that the communication is admissible and proceeds to an examination on the merits of the case.

7.1 The Committee must decide whether the forced return of the complainants to Sri Lanka would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (refouler) individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture. In reaching 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 (article 3, paragraph 2, of the Convention).

¹ UN Doc. A/57/44, at para. 181.

7.2 The Committee has noted recent reports on the human rights situation in Sri Lanka to the effect that, although efforts have been made to eradicate torture, instances of torture in police custody continue to be reported and complaints of torture are frequently not investigated effectively.²

7.3 The Committee reiterates that the aim of its examination is to determine whether complainants would personally risk torture in the country to which they would return. It follows that, irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist in Sri Lanka, such existence would not as such constitute sufficient grounds for determining that the complainants would be in danger of being subjected to torture upon return to Sri Lanka. Additional grounds must be adduced to show that they would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not necessarily mean that the complainants cannot be considered to be in danger of being subjected to torture in the specific circumstances of their case.

7.4 As regards the complainants' personal risk of being subjected to torture at the hands of the Sri Lankan police, the Committee notes their claim that the combined effect their deceased brother's JVP membership, their efforts to see his death investigated properly, the first complainant's past torture and the criminal proceedings pending against him, as well as the desertion from the army of the second complainant's husband and its consequences, would be tantamount to expose them to a high risk of torture upon return to Sri Lanka. It also takes note of the State party's challenge to the complainants' credibility, to the authenticity and relevance of the evidence submitted by them, and to their assessment of their personal risk and of the general human rights situation in Sri Lanka.

7.5 Insofar as the first complainant alleges that he was tortured in 1995, the Committee has noted the total absence of any medical evidence which would corroborate this claim. It observes that the burden would have been upon the complainants to present pertinent evidence to that effect.³ Even assuming that the first complainant was tortured during his detention at Colombo Fort police station, the alleged instances of torture occurred in 1995 and, thus, not in the recent past.⁴ Similarly, the political activities and the execution of the first and second complainant's brother cannot be considered relevant in relation to their non-refoulement claim, as they date back to 1992.

7.6 The Committee has finally taken note of the copies and translations of the documentary evidence submitted by the complainants, including a bail receipt dated 21 December 1995 for the amount of 10,000 Rupees; a written statement dated 14 July 1998 signed by a warden of Mahara prisons, confirming that the first complainant was detained between 4 July and 22 December 1995; an arrest warrant dated 9 December 1998 against the first complainant for failure to appear in court; his indictment for attempted robbery on 27 June 1995 and the pertinent trial transcript of

² See Amnesty International, Annual Report 2004: Sri Lanka; Human Rights Watch, World Report 2005: Sri Lanka; U.S. Department of State, Country Reports on Human Rights Practices, Sri Lanka, 28 February 2005.

³ See General Comment No. 1: *Implementation of article 3 of the Convention in the context of article 22*, 21 November 1997, at para. 5.

⁴ See *ibid.*, at para. 8 (b).

the Colombo High Court with translations dated 18 August 2000. But even if these documents were to be considered authentic, they merely prove that the first complainant was detained and released on bail and that, subsequently, he might have been indicted and tried *in absentia* for attempted robbery. In this regard, the Committee recalls that the mere fact that the first complainant would be arrested, retried and possibly convicted in Sri Lanka would not as of itself constitute torture within the meaning of article 1, paragraph 1, of the Convention; nor would it constitute substantial grounds for believing that any of the complainants would be in danger of being subjected to torture in the event of their return to Sri Lanka.⁵

7.7 With regard to the desertion from the Sri Lankan army in 1994/95 of the second complainant's ex-husband, the Committee does not consider that any of the complainants would have to fear persecution on the basis of family co-responsibility, as the second complainant's marriage was dissolved by divorce judgment of 5 October 1999.

7.8 In the light of the above, the Committee need not consider the first complainant's request, under Rule 111, paragraph 4, of the Committee's rules of procedure, for a personal hearing.

7.9 The Committee therefore concludes that the complainants have not adduced sufficient grounds for believing that they would run a substantial, personal and present risk of being subjected to torture upon return to Sri Lanka.

8. 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 complainants' removal to Sri Lanka by the State party 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.]

⁵ See Communication No. 57/1996, *P.Q.L. v. Canada*, Views adopted on 17 November 1997, at para. 10.5.