

COMMITTEE AGAINST TORTURE

N. P. v. Australia

Communication No 106/1998

6 May 1999

CAT/C/22/D/106/1998

VIEWS

Submitted by: N. P. (Name withheld)

Alleged victim: The author

State party: Australia

Date of communication: 25 December 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 6 May 1999,

Having concluded its consideration of communication No. 106/1998, submitted to the Committee against Torture 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 and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is N. P., a Sri Lankan of Tamil ethnic origin, currently residing in Australia where he has applied for asylum and is at risk of expulsion. He alleges that his expulsion would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented before the Committee by his cousin, Mahendra Nirajah.

The facts as submitted by the author

2.1 The author comes from Manipay, in the northern part of Sri Lanka. He claims that, even as a young boy, he was obliged to assist the Tamil separatists, the Liberation Tigers of Tamil Eelam (LTTE), in various ways, such as distributing their newspapers, selling publications and encouraging students to attend their meetings.

2.2 In the course of a military offensive conducted in the north of the country in 1987, (In the author's communication the incident in question was said to have taken place in 1982), a landmine exploded near his family's house and some soldiers were killed. As a result, the author was detained for 20 days, tortured and deprived of family visits. In 1988, the antiLTTE group EPRLF, operating in collusion with the Sri Lankan army, came to the author's school and warned the students against supporting the LTTE. The author was singled out, brought to a EPRLF camp and tortured before he was released. In 1989, clashes between Tamil militants and the Sri Lankan army resulted in frequent shelling and aerial bombings in the area of Manipay. The author's family house was destroyed and the family became displaced, living in different refugee camps in the region.

2.3 Subsequently, the author started working in Colombo as a computer instructor. He was again forced to assist the LTTE and was detained several times and interrogated. In 1994 he was caught up in a cordon and search operation and held in detention for 17 days together with eight other Tamils. The author states that he was kept in a dark room except during interrogation, when strong lights were flashed upon his face. The author was allegedly beaten, not given proper food and subjected to sleep deprivation. He had to sleep on the floor, but as soon as he fell asleep buckets of water were thrown over him to keep him awake. The detainees were subsequently released with a severe warning.

2.4 The author states that after this incident, he tried to discontinue his association with the LTTE, but the organization's demands did not cease. He did not dare to report anything to the police for fear of reprisals against his family in Jaffna. He assisted in the purchase of computer equipment and other materials. In early 1997 he was contacted by an LTTE member who requested him to provide accommodation for the night. The man left early the next morning but was later arrested by the police, to whom he revealed the author's name. The author states that the police came to his workplace. Suspecting that they were searching for him, he managed to leave unseen. Fearing that his activities had become known to the authorities, the author contacted an agent who arranged for his travel to Australia via Singapore with a false passport.

2.5 The author arrived in Australia on 17 March 1997 and applied for a protection visa on 21 March 1997. The application was rejected by the Department of Immigration and Multicultural Affairs on 3 June 1997. The Refugee Review Tribunal (RRT) turned down his appeal on 28 July 1997. Subsequent appeals, including an application based on new information and a psychological assessment report, were considered inadmissible by the Department of Immigration and Multicultural Affairs, the Minister of Immigration and Multicultural Affairs and the Federal Court.

The complaint

3.1 The author fears that he will be arrested, tortured and killed by the army if he returns to his country. He argues that he has attracted the attention of the Sri Lankan police, military and pro-Government militant groups as a suspected supporter or member of the LTTE. In view of his past experiences, including torture, he cannot ask for the protection of the Sri Lankan authorities. He therefore submits that his forced return to Sri Lanka would constitute a violation by Australia of article 3 of the Convention.

3.2 The author further states that in view of the fact that he has previously been subjected to torture and is most probably suffering from a post-traumatic stress disorder, (no medical evidence submitted). even the possibility of detention and interrogation in the future would entail such emotional and physical pain that it would amount to persecution.

State party's observations

4.1 On 20 February 1998 the Committee, acting through its Special Rapporteur for new communications, transmitted the communication to the State party for comments and requested the State party, under rule 108, paragraph 9, of the rules of procedure, not to expel the author while his communication is under consideration by the Committee.

4.2 By a submission of 1 September 1998, the State party informed the Committee that, following its request under rule 108, paragraph 9, the author would not be expelled from Australian territory until the case had been examined by the Committee. In view of the circumstances of the author's case, it was likely that he would remain in immigration detention until that time; the Committee was therefore requested to examine the communication as soon as possible. The State party challenged the admissibility of the communication, but also addressed the merits of the case.

A. Observations on admissibility

4.3 With respect to admissibility the State party submits that the communication is inadmissible because it lacks the minimum substantiation that would render it compatible with the Convention, in accordance with the jurisprudence of the Committee (Communication No. 18/1994, X v. Switzerland; Communication No. 17/1994, X v. Switzerland; Communication No. 31/1995, X and Y v. the Netherlands). It notes the Committee's general comment on the implementation of article 3, according to which it is the responsibility of the author to establish a prima facie case for the purpose of admissibility of his or her communication, (General comment by the Committee against Torture on the implementation of article 3 in the context of article 22 of the Convention against Torture dated 23 November 1997 (A/53/44, annex IX). In the State party's view, where there is question of possible refoulement there is a particular onus on the author to substantiate and convincingly plead a prima facie case. Unlike allegations relating solely to events on the territory of the responding State party, refoulement cases by their very nature are concerned

with events outside the State party's immediate knowledge and control. The evidence of the author and alleged victim assumes greater importance.

4.4 The State party argues that the evidence supporting the allegation lacks credibility, since it is inconsistent, not detailed and not independently corroborated. Accordingly, the author has not established, *prima facie*, substantial grounds for his case.

4.5 On 9 February 1996, the author's father applied for a Sri Lanka (Special Assistance) Visa for entry to Australia. These visas were introduced in 1995 for the purpose of assisting Sri Lankans whose lives had been seriously disrupted by the fighting. At the time of the application, the grant of the visa was conditional on one of the members of the family unit "the applicant" satisfying criteria that included the following: the applicant must be a Sri Lankan citizen usually residing in Sri Lanka at the time of the application; the applicant's life had to have been seriously disrupted by the fighting in Sri Lanka in the 18 months preceding the date of application; the applicant had to be unable to resume normal life; the applicant had to have suffered substantial discrimination on the grounds of ethnicity or political belief; the applicant must have a parent, daughter, son, brother, sister, aunt, uncle, nephew or niece who was an Australian citizen or permanent resident on 1 January 1994, was usually resident in Australia and who would provide an undertaking to support the applicant.

4.6 The application was made in February 1996, i.e. less than 18 months after the alleged arrest and torture of the author by police in October 1994 and after the other alleged instances of ill-treatment of the author in 1994, 1993, 1989, 1988 and 1987. However, no mention was made in the application of any ill-treatment of the son, despite the fact that the application form stated that claims by any member of the close family which supported the application should be included. It is likely that the author's father would have known of any ill-treatment of his son since the latter had been a schoolboy of approximately 15 when the first instance of torture allegedly occurred. Moreover, the son appears to have kept in regular contact with his father after leaving for Colombo. In the State party's view, the omission by the author's father of any reference to the considerable ill-treatment that is later alleged by his son undermines the author's credibility.

4.7 The State party further submits that the author lacks credibility in view of inconsistent evidence and admissions he has made since his arrival in Australia. The State party underlines that it is not concerned with minor or irrelevant inconsistencies and that it recognizes the jurisprudence of the Committee that complete accuracy in the application for asylum is seldom to be expected of victims of torture (Communication No. 41/1996, Kisoki v. Sweden, 8 May 1996, para. 9.3; Communication No. 43/1996, Tala v. Sweden, 15 November 1996, para. 10.3). In the category of minor or irrelevant inconsistencies Australia places the differing allegations regarding the year and extent of damage to the family home after shelling by the army in the 1980s; the perpetrators of the alleged arrest of the author in 1987; the means by which the author received confirmation that the police who visited his workplace in early 1997 were in fact looking for him. The evidence provided to Australia by the author and his advisers has, over time, included increasingly elaborate, and at times conflicting, statements of fact concerning his alleged treatment in Sri Lanka.

4.8 The variations between the author's original and later statements were noted by the RRT at its hearing. On arrival at Melbourne airport, the author was asked whether he had had any trouble with the police/army in his home country or whether his family had experienced any other disruption. His response was that he had been detained on one occasion, overnight. No reference was made to any ill-treatment. One month later, in the statement supporting his application for a protection visa, the author mentioned no fewer than seven instances of alleged mistreatment, detention and/or torture. Three months after arriving in Australia, in his reasons for review filed with the RRT, he mentioned an additional experience: the alleged interrogation for 20 days in December 1996. Responding to a request by the RRT, for an explanation, the author stated that he had "misunderstood the question at the airport concerning difficulties with the authorities". [The State party notes that there was no interpreter present at the interview with the author on his arrival at Melbourne airport. However, in relation to the potential for misunderstanding, the State party also notes the following comment by the RRT:

"[The author] appears to have been able to understand and respond (*sic*) to a range of other questions to which he supplied detailed factual answers. The Immigration inspector recorded that [the author] 'appeared to be fluent in English and as such was interviewed without the need of an interpreter'. (Another Sri Lankan detained at the same time was provided with an interpreter; it does not appear that [the author] at any stage requested an interpreter or expressed any difficulty). The author's own application form later described his ability to speak, read and write English as 'reasonable'".

The State party is of the view that the author's explanation undermines his credibility with respect not only to the incident that he later said caused him to leave Sri Lanka, but to all later allegations of ill-treatment.

4.9 There were also contradictory statements regarding his movements in Sri Lanka. In his arrival interview he said that he had lived in Jaffna until going to Colombo in January 1997 to further his studies. Later, in his compliance interview with the Department of Immigration and Multicultural Affairs, the author stated that he had lived in Jaffna until March 1993, then lived in Colombo from March 1993 to February 1995, returning to Jaffna in March 1995 because of the conditions in Colombo; he returned to Colombo about a month before his departure for Singapore and Australia. When questioned about the different stories by the RRT, the author stated that on arrival he had untruthfully concealed his employment in Colombo in 1993/94 because he had been told that this might lead to his immediate deportation. The State party, like the RRT, has formed the view that the author has diverged from the truth where it has suited his purposes.

4.10 The State party underlines the importance of the RRT findings. The tribunal has experience in reviewing applications concerning Sri Lankan nationals. In the 1996/97 programme year, 930 applications for review were received by the RRT from Sri Lankan nationals. Of the 678 applications processed, 236 were set aside and 408 were affirmed. Thirty-four applications were otherwise resolved. Thus, in relation to primary decisions, the set aside rate on review was 37 per cent.

4.11 Furthermore, the State party states that its view that the author's allegation lacks substantiation is supported by the lack of detail concerning, and independent corroboration of, the ill-treatment he allegedly experienced. During the asylum procedure the author has only described once the details of his ill-treatment. Even then, he described only one of the nine instances. There is no evidence to indicate that the author suffers from posttrauma stress which might affect his ability to provide detail of prior traumatic events.

4.12 The State party also points out that there are no documents to support the allegation that the author would face risk on return. Despite his claim to have some scars as the result of the torture he suffered at the hands of the EPRLF, the author has not provided any evidence of any permanent scarring that is consistent with the alleged mistreatment at the hands of the Sri Lankan authorities.

B. Observations on merits

4.13 The State party submits that should the Committee declare the communication admissible, it should be found to be without merit.

4.14 The State party recognizes that fighting between the LTTE and the Sri Lankan Government in recent years has taken a heavy toll on the civilian population and that despite an improvement in the human rights situation in recent years, mass movements of civilians and human rights infringements by both the security forces personnel and the LTTE continue to take place. However, in accordance with the Committee's jurisprudence, specific grounds must exist indicating that the individual concerned would be personally at risk of torture upon return.

4.15 Despite the level of ethnic conflict which exists in Sri Lanka at present, and on the basis of the State party's understanding of the author's background and the current situation in Sri Lanka, the State party has formed the view that, as a matter of fact and law, there are no circumstances particular to the author which constitute sufficient grounds for believing that he personally would be subjected to torture upon his return.

4.16 The author is a young Tamil man from Jaffna whose family has suffered as a result of the ethnic conflict, however, he has not suffered to any greater extent than any other young Tamil from the north. For the reasons presented in its admissibility submission, the State party cannot accept his allegations of ill-treatment, with the exception of the overnight detention in early 1996.

4.17 The State party has formulated its views on the likely treatment of a person in the author's situation based on the assessment of several expert groups in Sri Lanka, including the Australian High Commission in Colombo and independent organizations, and highlights, inter alia, the following. It is recognized that Tamil people in Sri Lanka are subjected to a greater degree of surveillance, suspicion and arrest than non-Tamil people. One of the impacts of the LTTE attacks since October 1997 is a tightening of security in Colombo.

More Tamil people are being caught up in the security measures, such as cordon and search operations (commonly called a "round-up") or checkpoints. Their purpose is to identify possible terrorists. People who do not have identity documents that readily establish their bona fides must find other means to do so. Those who do not have documentation and do not satisfy police that they have a legitimate reason for being in the city will be detained until their bona fides are established.

4.18 In Jaffna, security is less tense but security checks are nevertheless frequent. Checks take the form of channelling all people moving on a street into a single file for frisking. At these points, passengers in all passing vehicles are also searched. During cordon and search operations, everybody present, whether Tamil, Singhalese or Muslim, is checked. Non-Tamils are likely to be sent on their way and those detained will almost invariably be Tamil.

4.19 The State party submits that the profile of a person who might come under scrutiny in any such situations is the same: young Tamils from the north or east of Sri Lanka are most likely to be detained. However, the State party understands from consistent reports since February 1997 by the Australia High Commission in Sri Lanka and confirmed by independent sources that only a small percentage of people caught in a cordon and search operation or at a checkpoint are detained and, of those detained, the overwhelming majority are released once their identification and bona fides are established.

4.20 In addition, the State party notes that Tamil people, like anyone else, continue to have the protection of the law against unlawful activities by security services. Detained persons and their families have access to the assistance of the Human Rights Commission and international humanitarian organizations. There is evidence that intervention by these organizations in cases of individuals detained for lengthy periods has led to a speedy resolution of the case. The Sri Lankan Government has also demonstrated its willingness to avoid complicity in unlawful ill-treatment of Tamils. In December 1994, it enacted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act (No. 22 of 1994) which makes it an offence for any person to torture, to aid or abet torture, or to conspire or attempt to torture any other person. It has also prosecuted members of the security services who have violated the law.

4.21 The State party notes the current practice of other States in relation to failed asylum seekers from Sri Lanka. On 13 February 1998, the Australian High Commission in Colombo advised the Government that most Western missions in Colombo continue to be firmly of the view that Colombo and most urban centres in Sri Lanka are safe for the return of failed asylum seekers. Countries which are actively repatriating Sri Lankans include Switzerland, Germany, Sweden, Norway, the United Kingdom, Italy and the Netherlands.

4.22 In view of the above, the State party does not consider that the author will be of interest to the security forces in a situation of active conflict, as he has denied active involvement in the activities of the LTTE. The State party has also confirmed that it is possible for a Sri Lankan national in the author's situation to obtain a full Sri Lankan passport and thereby re-enter Sri Lanka without drawing attention to himself.

4.23 On the other hand, the State party accepts that the author does come within the profile of individuals likely to come under scrutiny by the Sri Lankan authorities. It also recognizes that the author will have to apply for an identification document soon after his return which may take some days, during which time he may be particularly vulnerable to being questioned, and possibly detained, either in a cordon and search operation or at a checkpoint. However, such vulnerability itself does not provide substantial grounds for believing that the author would be subjected to torture. On the basis that his bona fides will be able to be verified by the Sri Lankan authorities, the State party submits that the chances of the author being tortured, or indeed detained for a prolonged time, are very remote indeed.

4.24 Finally, the State party draws the Committee's attention to the requirement that the risk to the alleged victim be a risk of torture, rather than a less severe form of ill-treatment. The State party submits that neither the fact of detention itself, nor detention and questioning, has the necessary degree of deliberateness or intentionality nor the necessary severity of pain to fall within the definition of torture in the Convention. Even if the Committee were to accept that the only instance of alleged torture that is described by the author was substantiated, it cannot be assumed that treatment of this kind would fall within the scope of the definition of torture. The author has described an alleged experience of questioning combined with assault and deprivation of food, drink and sleep which, according to the jurisprudence of the European Court of Human Rights, does not necessarily constitute torture but rather inhuman and degrading treatment.

4.25 In conclusion, there is no evidence that the author has personal characteristics that make him more likely to come to the attention of the Sri Lankan authorities than any other young Tamil from the north. For these reasons, the State party submits that there are no substantial grounds to believe that the author would face torture on his removal to Sri Lanka.

Moreover, any treatment the author is likely to receive at the hands of the Sri Lankan authorities would not have the necessary deliberateness or severity to constitute torture as defined in article 1, paragraph 1, of the Convention.

Author's comments

5.1 In accordance with rule 110, paragraph 4, of the rules of procedure of the Committee, the observations received from the State party were communicated to the author's representative, with the request that any comments he might wish to submit thereon should reach the Committee within six weeks of the date of the transmittal. No such comments were received despite a reminder sent several months after the given deadline.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee notes that the author has not provided comments to the State party's observations and considers that, in accordance with rule 108, paragraph 8, of its rules of procedure, non-receipt of such comments within the established time-limit should not delay the

consideration of the admissibility of the communication. It therefore proceeds to the examination of the admissibility issue.

6.2 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 and notes that the exhaustion of domestic remedies is not contested by the State party. It further notes the State party's view that the communication is inadmissible because it lacks the minimum substantiation that would render it compatible with the Convention and that there is a particular onus on the author to substantiate and convincingly plead a *prima facie* case in *refoulement* cases. The Committee nevertheless considers that the author has provided enough substantial elements *prima facie* and that his communication is compatible with the provisions of the Convention. It therefore considers that the communication is admissible.

6.3 Since the State party has also provided observations on the merits and the author, in accordance with rule 110, paragraph 4, of the rules of procedure, has been given the opportunity to make comments on such observations, the Committee will proceed to examine the communication on its merits.

6.4 The Committee must decide whether the forced return of the author to Sri Lanka 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/she would be in danger of being subjected to torture. In order 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. Similarly, 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.

6.5 The Committee is aware of the serious situation of human rights in Sri Lanka and notes with concern the reports of torture in the country, in particular during pre-trial detention. It is also aware of the fact that Tamils are at particular risk of being detained following controls at checkpoints or search operations.

6.6 Although the Committee considers that complete accuracy is seldom to be expected from victims of torture, it notes the important inconsistencies in the author's statements before the Australian authorities. It further notes that the author has not provided the Committee with any arguments, including medical evidence, which could have explained such inconsistencies. Accordingly, the Committee is not persuaded that the author faces a personal and substantial risk of being tortured upon his return to Sri Lanka.

7. In the circumstances the Committee, 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 decision of the State party to return the author to Sri Lanka would not constitute a breach of article 3 of the Convention.