

COMMITTEE AGAINST TORTURE

Halimi-Nedzibi v. Austria

Communication No. 8/1991

5 May 1992

CAT/C/8/D/8/1991*

ADMISSIBILITY

Submitted by: Mr. Qani Halimi-Nedzibi

Alleged victim: The author

State party: Austria

Date of communication: 27 September 1991

Date of present decision: 5 May 1992

Decision on admissibility

1. The author of the communication is Qani Halimi-Nedzibi, a Yugoslav citizen, currently imprisoned in Austria. He claims to be a victim of a violation of articles 12 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Austria. He is represented by counsel.

The facts as submitted by the author

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

2.2 The author alleges that following his arrest in 1988 he and six named witnesses were maltreated, beaten and tortured by police inspector Josef Janulik, who was in charge of the criminal

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

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

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

2.5 The author states that a criminal procedure against police inspector Janulik is pending.

The complaint

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

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

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

4.2 It submits that criminal proceedings against inspector Janulik, initiated on 5 March 1990, following a complaint by the author, are still pending. The length of the investigations is attributable to the fact that difficulties have arisen in obtaining the testimonies of witnesses in Yugoslavia and Turkey. The State party indicates that, if inspector Janulik is found guilty of having ill-treated detainees in order to obtain incriminating statements, the author's case could be reopened. It argues that a retrial would constitute an effective remedy.

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

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

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

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

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

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

5.2 As regards the exhaustion of domestic remedies, counsel submits that it is incomprehensible that the criminal proceedings against inspector Janulik have not yet been concluded. He contends that the proceedings are unreasonably prolonged and indicates that the delay appears to be attributable to the fact that the State party has joined the author's case with other pending matters against inspector Janulik. Thus, the difficulties in obtaining the testimony of witnesses in Yugoslavia and Turkey, concerning another investigation, are postponing the clarification of the author's allegations. He contends furthermore that the Courts failed to examine the allegations of torture in a timely fashion, during the criminal proceedings against the author.

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

5.4 Concerning the State party's contention that article 15 of the Convention has not been violated, counsel submits that it is not clear from the text of article 15 how it should be established that a statement is made as a result of torture. He argues that it is sufficient that the author adduced some evidence indicating that a statement was given as a result of torture. In this connection he refers to the difficulty for a victim to prove that he has been subjected to torture, owing to the isolation in

detention and the absence of independent witnesses during interrogation. He further states that article 15 applies to “any statement”, not only to confessions or false statements, as the State party seems to imply. He finally argues that it cannot be said that the author’s allegations were examined by the jury during his trial, as inspector Janulik was not questioned on the issue, nor confronted with the witnesses.

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.

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. The Committee is aware that the European Commission of Human Rights has registered a case concerning the author, but regarding a different matter.

6.3 Article 22, paragraph 5 (b), of the Convention precludes the Committee from considering any communication from an individual, unless it has ascertained that the individual has exhausted all available domestic remedies; this rule does not apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief.

6.4 On the basis of the facts stated in the communication by the author and in the reply by the State party, the Committee is of the opinion that there has been an unjustified delay in the conduct of investigations designed to determine the veracity of the complaint of torture which the author made to the judicial authorities. It should be noted that Mr. Qani Halimi-Nedzibi made the allegation of torture in December 1988 (see para. 2.2) and that the State party proceeded on 5 March 1990 to open an investigation against Mr. Janulik, which is still pending.

6.5 The lack of a decision in the proceeding against MR. Janulik makes it absolutely pointless to apply for any domestic remedy based on a violation of article 15 of the Convention, including a possible constitutional appeal.

6.6 The fact that there was no prompt and impartial investigation of the complaint by the author, as required under articles 12 and 13 of the Convention, also does not appear to be subject to appeal at this stage through the filling of an application for some domestic remedy.

6.7 The Committee considers, moreover, that, in order to decide on the formal admissibility of the communication, it does not have to state an opinion on the arguments as to the merits put forward by the State party on article 15 of the Convention.

6.8 Although the author has referred only to articles 12 and 15 of the Convention, the Committee notes that the facts as presented may raise questions relating to other provisions of the Convention.

6.9 The Committee none the less draws the attention of the State party to rule 110, paragraph 6,

of its rules of procedure, which provides that any decision on the admissibility of a communication may be reviewed in the light of any relevant information that might subsequently be received.

7. The Committee against Torture therefore decides:

(a) That the communication is admissible;

(b) That, in accordance with article 22, paragraph 3, of the Convention, the State party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it. The State party is requested, in particular, to provide the Committee with a copy of the trial transcript;

(c) That the State party be requested to forward to the Committee any information relating to the state of the author's health, a photocopy of his medical file, and, in particular, a photocopy of the file of the 1988 hospital examination of his eye injury;

(d) That the author be invited to give the State party the necessary authorization for the submission of the document under (c) and to forward to the Committee all the medical documents at his disposal;

(e) That the Secretary-General shall transmit any information or observations received from either of the parties to the other party, to enable that party to comment thereon. Any such comments should reach the Committee against Torture in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(f) That this decision shall be communicated to the State party, to the author and to his counsel.

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

*/ All persons handling this document are requested to respect and observe its confidential nature.