

COMMITTEE AGAINST TORTURE

A. D. v. The Netherlands

Communication No 96/1997

12 November 1999

CAT/C/23/D/96/1997

VIEWS

Submitted by: A. D. (Name withheld) [represented by counsel]

Alleged victim: The author

State party: Netherlands

Date of communication: 7 November 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 12 November 1999,

Having concluded its consideration of communication No. 96/1997, 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, his counsel and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1.1 The author of the communication is A. D., a Sri Lankan national of Sinhalese origin at present residing in the Netherlands where he has asked for asylum. His asylum request has been rejected and he is at risk of deportation. He claims that his return to Sri Lanka would violate the Netherlands' obligations under article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 19 November 1997.

The facts as presented by the author

2.1 The author states that since 1974 he has worked as a freelance photographer in Sri Lanka and that in 1990 he began to take pictures of people murdered or injured. The first pictures he took were of six people who had been burned and were lying on the side of a road between Minuwangoda and Jaela, tied to tyres. The author suspected that the victims were supporters of the Sinhalese nationalist People's Liberation Front (JVP). At first he took these pictures for himself out of indignation, but later he decided to make them public. The pictures were published in two newspapers (Lakdiwa and Rajatiya), in weekly magazines (Ira, Hannde and Janahita) and in a monthly review (Kolama). The author's name was not published at that time. In 1991, some of the author's signed pictures were exhibited at the National Photographic Art Society. Apparently, unknown persons made inquiries about the identity of the photographer.

2.2 On or around 8 October 1992, the author was visited in his studio by eight men who were dressed in black and wearing masks. They asked him whether he worked for newspapers and, although the author denied this, they destroyed his equipment. They also forced him to shut his studio and go home.

2.3 A few days later, two unknown persons abducted the author from his home in Colombo, blindfolded him, and drove him to a two-storey building where he was held with about 10 other persons in a room. The author believes that the other persons were members or supporters of the JVP. The author states that he was subjected to torture, including beatings, needles placed under his fingernails, being dropped from a height of about three meters, an iron rod inserted into his rectum, a bag of chili peppers tied over his head, hanging upside down by the legs for three hours and fake executions by hanging.

2.4 After 15 days he was released. He was driven blindfolded to the Rajagiriya graveyard and left there. He then walked to his home in Madjadah, Colombo. His neighbour took him to Kandy, near Barigama, after which he did not return to Colombo. He worked in Kandy, mostly in his studio, and appeared in public as little as possible.

2.5 The author arrived in the Netherlands in May 1993. On 23 September 1993 he filed a request for asylum or to be granted a residence permit on humanitarian grounds. In addition to the events recounted above, the author also brought to the attention of the asylum authorities that he had attended a meeting organized by the "Fédération internationale de l'art photographique" in the Netherlands where he made a speech criticizing the Sri Lankan regime.

2.6 On 19 October 1993, his request was denied by the State Secretary of Justice on the grounds that the author had not undertaken any political activities and was not considered a refugee according to the 1951 Convention relating to the Status of Refugees. The State Secretary further emphasized that the author had stayed in the Netherlands for four months

before requesting asylum and that he had travelled on a passport in his own name. Finally, the State Secretary noted that the opinions expressed in the Netherlands by the author about the Sri Lankan Government did not constitute grounds for granting him refugee status. On 22 October 1993, the author applied for a review of the decision, but the State Secretary denied suspensive effect to his application.

2.7 The author then initiated summary proceedings before the District Court in The Hague in order to obtain from its President a decision that he should not be deported pending the completion of the review procedure. This application was rejected on 14 December 1993 and on 29 July 1994, the State Secretary of Justice rejected the author's application for review.

2.8 On 10 August 1994, the author appealed the decision of the State Secretary to the District Court in The Hague, which rejected the appeal on 14 July 1995. Finally, on 5 December 1995, the Dutch section of Amnesty International intervened on behalf of the author, but the State Secretary replied on 16 May 1997 that she would not revoke her decision, *inter alia* due to the change which had taken place in the political situation in Sri Lanka since 1992.

2.9 The author states that he still suffers from health problems as a consequence of the torture to which he was subjected. He refers to a medical report, dated 11 December 1995, according to which he had problems with his shoulder, back and left leg, and that these conditions were not incompatible with the torture as described. In a further medical report of 23 October 1997 by Amnesty International's medical research team, it is stated that the physical examination showed several physical signs that fit the types of torture described by the author, such as insertion of needles under fingernails. The report further stated that although the author was not suffering from post-traumatic stress syndrome at the time, the anamnesis suggested that he had probably suffered from it in the past and was able to develop effective strategies to cope. According to the report, many indicators of post-traumatic stress were apparent, such as avoidance behaviour, partial amnesia and sleep disorders.

2.10 According to the author, the human rights situation in Sri Lanka in 1992 was alarming. Photographers and journalists were particularly targeted. He refers to press reports according to which in the early 1990s death squads known as "black cats" were operating with the support of the Government. Many human rights activists disappeared. After the 1994 elections the United National Party (UNP) lost power and was replaced in Government by the People's Alliance (PA). However, journalists continued to be intimidated and disappearances and executions continued. Prosecution and punishment for past human rights violations are said to be inadequate and the Government fails to control the police and the military.

The complaint

3.1 The author argues that he would be in danger of being tortured if he were to return to Sri Lanka. He states that there is a consistent pattern of gross, flagrant and mass human rights violations in that country and fears that those responsible for the killings photographed by him may seek revenge. He says that it cannot be required of someone who was a victim of

serious human rights violations in the past that he return to the country where those violations occurred.

State party's observations on admissibility and merits

4.1 In a submission of 19 January 1998, the State party informed the Committee that in its view, the author had exhausted available domestic remedies and that it accepted the admissibility of the communication. In submissions of 19 May 1998, 28 May 1998 and 19 June 1998, the State party presented its observations regarding the merits of the communication.

4.2 The State party points out that in the course of the domestic proceedings, a careful assessment had been made of the general human rights situation in Sri Lanka and the feasibility of return to Sri Lanka. According to the State party's available information, the so-called "Black Cats death squads" were active in the years 1988-1990, when the United National Party was in power. After the People's Alliance came into power in 1994, the human rights situation in Sri Lanka improved and all previous restrictions on the freedom of the press were withdrawn. In September 1995, when the armed conflict between the Government and the LTTE erupted again in the north, censorship was introduced on reporting about military operations in that area. Although the state of emergency and the censorship of reports of military operations in the north places constraints on journalists, the State party states that it has no information about journalists being harassed in connection with war reporting.

4.3 In view of the author's statements and documentary evidence, the State party does not doubt that the author is a photographer and that he took photographs from 1990 onwards, whether or not instructed to do so by various political parties, of victims of human rights violations, and that these photographs were published in various newspapers. The State party also considers it plausible that the author was in fact abducted because of these activities.

4.4 The State party wishes to draw the attention of the Committee to the discrepancies between the arguments and statements on which the communication is based and the statements made by the author in the initial domestic proceedings. In the domestic proceedings the author consistently stated that he had been abducted in March 1991 and held captive for 15 days. It was not until after the domestic proceedings had been concluded that the author stated, through Amnesty International, that the abduction and alleged torture had taken place not in March 1991 but on 8 October 1992. The author has not explained this inconsistency, although it is important for an assessment of his account. Had he been abducted in 1991 it would be curious that it was not until 8 October 1992 that men approached him and urged him to close his studio. In any event, the author has not supplied any information about the period between March 1991 and 8 October 1992. His explanation for this, namely that he had been unable to communicate adequately due to the absence of a Sinhalese interpreter, is not credible. The author's national case file makes it clear that his command of English is sufficient for him to have been able to supplement his story accordingly.

4.5 Furthermore, when the author lost his appeal he also changed the statement he had made during the domestic proceedings that he did not decide to leave Sri Lanka until May 1993. He apparently stated to Amnesty International that he had already decided to leave his country after his alleged abduction on 8 October 1992. He has not supplied an adequate explanation for this inconsistency either. In the State party's opinion, the author probably changed his story to make it more logically consistent.

4.6 In addition, the State party points out that from the moment of his release in October 1992 until the date of departure in May 1993, the author was able to avoid any further problems by moving to a different part of the country. The State party submits that it does not have enough information to ascertain whether the author was obliged to do this work in secret, as he maintains. Finally, the State party argues that the author's photographic activity related to exposing of the misdeeds of the previous United National Party regime, which would not put him at risk for persecution from the present Government.

4.7 As to the assessment of the medical evidence supplied by the author, the State party notes that the medical certificate of 11 December 1995 stated that the violence described by the author *might* have caused the pain in his shoulders and back from which he was suffering. The State party also refers to the medical examination conducted by the medical research team of Amnesty International after the domestic proceedings had been formally concluded, noting that while the physical examination revealed a variety of abnormalities consistent with the type of torture the author had described, the author did not satisfy the criteria for a diagnosis of post-traumatic stress syndrome, and although he might have suffered from this syndrome in the past he had managed to develop effective ways of coping with it.

4.8 Lastly, the State party argues that several of the individual factors that the Committee has deemed to be of decisive importance in other communications it has dealt with play little or no role in the present one, such as the ethnic origin or political activities of the individual concerned. In the present case the author did not have any problems relating to his Sinhalese origin, nor did he sympathize with or work actively for any political party.

4.9 The State party concludes that the author has not substantiated elements which would allow it to be concluded that, on the basis of his ethnic background, alleged political affiliation and history of detention, the author would be in danger of being subjected to torture upon his return to Sri Lanka. Accordingly, it considers the communication ill-founded.

Counsel's comments

5.1 In his reply to the State party's submission, counsel notes that the State party does not contest the most important elements of the author's account of his activities as a photographer, i.e. abduction and escape from Sri Lanka. The inconsistencies to which the State party refers do not raise doubts as to the general veracity of his claim and are to be explained by the absence of a Sinhalese interpreter during the initial asylum proceedings and

the fact that the author had previously been subjected to torture and serious ill-treatment..

5.2 Counsel further notes the State party's argument that the author's activities in Sri Lanka were not based on political conviction and that he was never a member of a political party. According to counsel the position of the State party displays an incorrect and narrow definition of "political belief". Even though the author was not member of a political party, political belief was attributed to him by the authorities owing to his having published photographs of victims of human rights violations. According to both Dutch case law and international refugee law, attributed political belief has been considered as one criterion for determining refugee status.

5.3 Counsel refutes the argument that by moving to another part of Sri Lanka the author was able to avoid any further difficulties from October 1992 until his departure. Counsel maintains that the author went into hiding and worked in secret and points out that the State party itself admits not having enough data to ascertain whether the author was actually obliged to work in secret. The question of an internal flight alternative was not previously raised during the domestic proceedings and should therefore not be an issue before the Committee. In any case, an internal flight alternative would not be feasible, in view of the fact that the author was being persecuted by the authorities.

5.4 With respect to the medical evidence, counsel submits that the State party should have conducted its own medical examination in view of the author's claim that he had been subjected to torture. A medical examination, conducted by the Bureau of Medical Advice of the Ministry of Justice, could have demonstrated that the torture to which the author was subjected in Sri Lanka had resulted in a post-traumatic stress disorder.

5.5 With reference to the general political situation in Sri Lanka, counsel draws the attention of the Committee to the fact that in view of the uncertain and dangerous situation prevailing in the country, Dutch authorities have for a period of time refrained from deporting Sri Lankan asylum-seekers. In the present situation there is no guarantee that the author would not risk persecution from the Government now in power in Sri Lanka, nor that he would be effectively protected by the Government should he be persecuted or tortured by these previously in power.

Additional observations by the State party and counsel

6.1 On 14 December 1998 the State party provided the Committee with additional observations in response to counsel's comments. It pointed out that counsel's comments regarding the non-deportation of Sri Lankan asylum-seekers was incorrect. In spring 1998 the State Secretary for Justice considered it unnecessary to change the policy on expelling asylum-seekers in connection with the situation in Sri Lanka. On 23 June 1998, the State Secretary for Justice informed the Lower House of Parliament that rejected Tamil asylum-seekers would not be expelled from the Netherlands, pending a court judgement on an appeal brought by a Tamil and in the light of the injunction granted in that case. The decision not to expel this category of person during a certain period of time was thus a procedural matter. In a judgement of 9 October 1998, the Hague District Court considered that the State

Secretary for Justice could in all reasonableness have concluded that expelling rejected Tamil asylum-seekers to Sri Lanka could not be construed as a particularly harsh measure. The present policy of returning Sri Lankan asylum-seekers is therefore still in place.

6.2 The State party further informed the Committee that on 17 November 1998, the State Secretary for Justice informed counsel that the author might be eligible for a residence permit for medical treatment. According to the State party's information, the author had applied for such a permit, which was likely to be granted within a foreseeable period. The State party submitted that once the author had received a residence permit for medical treatment, he would no longer be at risk of expulsion and the grounds for his application to the Committee would cease to exist.

6.3 On 22 April 1999 counsel informed the Committee that the author had not yet received any residence permit for medical treatment. Furthermore, such a permit would be temporary and expire when the medical treatment was no longer necessary in the view of the medical adviser to the Ministry of Justice. Counsel submits that such a permit only postpones the expulsion risk, and that this is inadequate in order to fulfil the requirements of article 3 of the Convention.

6.4 By submission of 28 October 1999, the State party informed the Committee that on 7 June 1999 the State Secretary of Justice granted the author a residence permit for medical treatment, valid from 9 December 1998 until 30 September 1999. Counsel confirmed that information. Furthermore, the author had requested an extension of this permit. There was no risk of expulsion while his request was under consideration.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not the communication 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. The Committee further notes the State party's view that the author has exhausted domestic remedies and that it accepts the admissibility of the communication. The Committee finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author's counsel have provided observations on the merits of the communication, the Committee proceeds with the consideration of such merits.

7.2 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Sri Lanka. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to 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 a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist 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.

7.3 The Committee notes the State party's information that the author at present does not risk expulsion, pending the consideration of the author's request for extension of his residence permit for medical treatment. Noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended temporary permit for medical treatment is not sufficient to fulfil the State party's obligations under article 3 of the Convention.

7.4 The Committee considers that the author's activities in Sri Lanka and his history of detention and torture are relevant when determining whether he would be in danger of being subjected to torture upon his return. The Committee notes in that respect that although the State party has pointed to inconsistencies in the author's account of events, it has not contested the general veracity of his claim. The Committee further notes the medical evidence indicating that the author, although not at present fulfilling the criteria for a diagnosis of a post-traumatic stress disorder, may have suffered from this syndrome in the past. However, the Committee also notes that the harassment and torture to which the author was allegedly subjected was directly linked to his exposure of human rights violations taking place while the previous Government was in power in Sri Lanka. The Committee is aware of the human rights situation in Sri Lanka but considers that, given the shift in political authority and the present circumstances, the author has not substantiated his claim that he will personally be at risk of being subjected to torture if returned to Sri Lanka at present.

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, 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.