

COMMITTEE AGAINST TORTURE

Alan v. Switzerland

Communication No. 21/1995*

8 May 1996

CAT/C/16/D/21/1995

VIEWS

Submitted by: Ismail Alan [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of communication: 31 January 1995

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

Meeting on 8 May 1996,

Having concluded its consideration of communication No. 21/1995, submitted to the Committee against Torture on behalf of Mr. Ismail Alan 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 the following:

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Ismail Alan, a Turkish citizen from Kurdish background, born on 1 January 1962, currently residing in Switzerland. He claims to be a victim of a violation by Switzerland of article 3 of the Convention. He is represented by counsel.

The facts as submitted

2.1 Since 1978, the author has been a sympathizer of KAWA, an outlawed kurdisch marxist-leninist organisation. In 1981, the author was arrested for the first time. He claims that he was tortured and interrogated about his organisational activities. After nine days, he was released. In June 1983, while fulfilling his military service, the author was once again arrested. He claims that he was brutally tortured during 36 days. He states that he was subjected to electric shocks.

2.2 On 30 April 1984, he was sentenced to 8 years and 4 months of imprisonment plus 2 years and ten days of internal exile, for being an active member of KAWA. His conviction was quashed by the Court of Cassation, on 17 October 1984, and a retrial was ordered. On 5 November 1984, the military tribunal of Elazig sentenced the author to two and a half years' imprisonment and 10 months' internal exile in Izmir, for having assisted militants of KAWA. During his internal exile in Izmir he had to present himself to the police every day. Eventually, the author found a job and bought a house in Izmir.

2.3 The author claims that he was arrested several times in 1988 and 1989 and kept in detention for short periods of time, not over six days, because of his political activities (distribution of flyers). The author claims that during these periods of detention, he was put under pressure to denounce his friends. He also states that he was tortured, without further specifying his claim. In the circumstances, the author thought it better to leave Izmir and to return to his province Tunceli, but when he visited the region in July 1990, he found that the repression was even worse there. By chance, the author met a member of parliament, whom he told about the situation in Tunceli. Later, the parliamentarian, after having conducted his own investigations, raised the matter in parliament. According to the author, the military then started looking for him. In the beginning of September 1990, when the author was visiting his brother in Bursa, the police searched his house, confiscated two books and questioned his wife about his whereabouts. The author then decided to leave and to seek asylum in Switzerland. He left Turkey with a falsified i.d.card on 20 September 1990.

2.4 Counsel submits a copy of a medical report, dated 25 January 1995, which concludes that the author suffers from a post traumatic stress disorder. Some scars on the left side of his body are compatible with tortures to which he allegedly was submitted during his imprisonment in 1983-84.

2.5 The author states that, after his departure, his wife was put under such pressure by the police that she left the town where she was living and moved to Bursa to live with family. In July 1992, the author's brother was allegedly detained during ten days and maltreated.

2.6 On 1 October 1990, the author requested asylum in Switzerland. On 5 November 1990, he was heard by the cantonal authorities, on 10 August 1992 by the Office Fédéral des Réfugiés (ODR). On 17 December 1992, the ODR informed the author that it had contacted the Swiss embassy in Ankara in order to verify some of the author's allegations, and that it appeared from the reply that the member of parliament with whom the author had said to have had contact, did not remember him, that there was no passport prohibition for the

author, and that a lawyer had represented the author in a civil judicial procedure after his departure in 1990.

2.7 Author's counsel, on 8 January 1993, spoke with the author's wife in Istanbul. She stated that her house had been under constant surveillance by the police and that she had contacted a lawyer because she felt threatened. She then had moved to Bursa, without officially taking up residence there in order not to be disturbed. The Swiss authorities were informed of the contents of the conversation. On 5 July 1993, counsel transmitted to the ODR a copy of a letter from the lawyer in Turkey, in which he stated that the embassy had misunderstood him and that he was not authorized to represent the author, but only his wife.

2.8 On 12 July 1993, the author was informed that the ODR, on 1 July 1993, had rejected his request for asylum. The ODR considered that the author's earlier imprisonment was too remote in time as to constitute a ground for fear of persecution. The decision was further based on contradictions concerning the author's arrests in the years prior to his departure from Turkey as well as concerning the intensity of his political engagement.

2.9 On 7 September 1993, the author appealed the decision to the Commission suisse de recours en matière d'asile. On 8 February 1994, the ODR once more approached the embassy in Istanbul for additional information. Basing itself on this information, the ODR found that the author was not listed in Turkey, that the police did not have him on record, and that he could freely change his residence. It considered unlikely that the initial information given by the Turkish lawyer to the embassy was based on a misunderstanding.

2.10 Author's counsel, by memorandum of 25 May 1994, contested these findings, and transmitted a copy of a letter, dated 4 May 1994, from the member of parliament, which confirmed his meeting with the author in the summer of 1990. On 18 October 1994, the author informed the ODR of the destruction of his native village in the province of Tunceli following political unrest, and of his brother's arrest.

2.11 On 27 October 1994, the Appeal Commission rejected the author's appeal; the author was ordered to leave Switzerland before 15 February 1995. The Commission considered that the author's imprisonment and subsequent internal exile were credible, but that the more recent political activities and arrests were not. It considered that, if the author feared difficulties in Izmir because of the local police, he could go to another part of the country.

2.12 As regards the author's argument that a return to Turkey would expose him to maltreatment and torture, the Appeal Commission found that by reference to the general situation in Turkey, the author's Kurdish background and origin, no special, individual and concrete risk had been shown to preclude the author's return. It considered that, since many Kurds lived peacefully in central and west Turkey, there was no reason why the author could not return to his country.

The complaint

3.1 Counsel argues that Turkey is among the countries where torture is systematically being

practised and human rights systematically being violated. In this context, counsel refers to the Committee's report of November 1993, and to Amnesty International reports. It is stated that since the publication of the Committee's report, the situation has not improved and that several detainees have died of torture. Others have disappeared or become victim of arbitrary execution. According to counsel, many of the persons affected have in the past supported the Kurdish cause.

3.2 As regards the author's personal situation, counsel submits that the fact that the author is a Kurd, that he originates from Tunceli, a province with a strong PKK presence where repression is heavy, that he is and continues to be a sympathizer of the illegal KAWA, that he has a criminal record in Turkey for having committed political crimes, that he has already been tortured in his country, and that he has been put under pressure to become an informer, indicates that he belongs to several target groups of Turkish repression. If the author crosses the border, he would certainly be arrested because he is not in possession of a passport or valid i.d.card.

3.3 It is further stated that cities in Turkey keep a registry of all Kurds who take up residence within their borders, in order to facilitate investigations into their political activities, and that razzias are regularly held in Kurdish neighbourhoods. The author thus runs a real risk of being arrested and consequently tortured.

State party's observations

4. On 10 February 1995, the Committee, through its Special Rapporteur, transmitted the communication to the State party for comments and requested the State party not to expel the author while his communication was under consideration by the Committee.

5. By submission of 3 April 1995, the State party informs the Committee that it does not challenge the admissibility of the communication.

6.1 By submission of 10 August 1995, the State party informs the Committee that it has deferred the author's expulsion, in compliance with the Committee's request.

6.2 The State party recalls that the author's request for asylum was rejected by the Office Fédéral des Réfugiés on 1 July 1993, and that his appeal was dismissed by the Commission suisse de recours en matière d'asile on 27 October 1994. The decisions were based on contradictory declarations made by the author (concerning the number of arrests, his political activities and his encounter with the member of parliament), on the fact that, contrary to his assertions, no record existed in Turkey in respect to him, that no recent acts of persecution could justify his departure from Turkey, the improbability that he would personally be threatened with torture, and the possibility for the author to settle in a part of Turkey where he would not be at risk. The State party emphasizes that its authorities have seriously examined the author's claim and that, in case of doubt, they have contacted the Swiss embassy in Ankara. The information so gathered has been transmitted to the author for comments, and he has had access to the whole file which was before the domestic authorities. His right to be heard has thus fully been complied with and the facts have been

established in as detailed a fashion as possible.

6.3 The State party explains that, in the instant case, the author has contradicted himself on numerous occasions. For instance, at the first hearing, he claimed to have been arrested four or six times since 1988, and to have been held each time for three or four days. Before the cantonal authorities, he claimed to have been arrested four times and to have been held for between three to six days. Furthermore, before the ODR he claimed to have been arrested 15 or 16 times.

6.4 Also, before the cantonal authorities the author claimed to have been kept in detention for four days in February 1988 because he had requested a passport. Before the ODR, however, he claimed that he was detained on that occasion because of suspicions that he had renewed contact with the organisation KAWA. The author's account of his political activities also shows inconsistencies, and the State party notes that he was not familiar with important dates connected to his alleged ideological affiliation.

6.5 The State party further refers to inconsistencies in the author's account of his purported encounter with the parliamentarian, and points to the contradictory declarations made by the author's lawyer in Turkey, who first affirmed having represented the author in a judicial procedure after his departure, and then later revoked this. According to the State party, it is likely that the lawyer made his second declaration as a favour to the author.

7.1 The State party notes the author's reasons for fearing detention and torture upon his return in Turkey, but submits that according to information collected by the Swiss embassy in Ankara, there is no outstanding file on the author, he is no longer sought by the police and no prohibition for a passport is in force. In these circumstances, the State party is of the opinion that it can reasonably demand of the author to establish himself in another region of Turkey. The State party submits that in general only listed individuals are being targeted by the authorities. Although no arbitrary actions by the police can be excluded, the State party is of the opinion that the risk is minimal if one avoids the more sensitive places.

7.2 The State party refers to the text of article 3 of the Convention, and argues that the author has invoked the general situation of the Kurds in Turkey to substantiate his fear of being subjected to torture, but has not demonstrated that he personally risks being subjected to treatment in violation of article 3 of the Convention.

7.3 The State party refers to its general asylum policy with regard to Kurds from Turkey and states that its authorities examine regularly and carefully the situation in the different regions of Turkey. The State party acknowledges that it is true that in some areas the situation of the Kurd population is difficult because of armed conflict between Turkish security forces and guerilla movements. However, the State party states that these conflicts are limited to certain regions and that it is not justified on this basis to proceed to a global judgment of all asylum claims of Kurds. The State party maintains that Kurds are not threatened in all regions in Turkey and that it is sufficient to examine in each case individually whether the appellant is personally affected by the situation and whether he could establish himself in another region.

7.4 The State party emphasizes that it does not contest the author's conviction and periods of detention between 1981 and 1985. However, it argues that these events happened too long ago to justify the author's departure from Turkey in 1990. Also, the probability that the author has been tortured between 1981 and 1985 does not justify the conclusion that substantial grounds exist that he will be in danger of being subjected to torture if returned to Turkey today. In this context, the State party explains that in terms of Swiss asylum practice, a causal link must be established between the acts of persecution against an appellant and his decision to flee the country. In the author's case, this link cannot be established.

8.1 Finally, the State party recalls that Turkey has ratified the Convention against Torture on 2 August 1988 and has recognised the competence of the Committee against Torture under article 22 to receive and examine individual communications. Consequently, Turkey is under an obligation to take measures to prevent acts of torture in its territory. Further, the State party notes that Turkey is a member of the Council of Europe, that it has ratified the European Convention on Human Rights and Fundamental Freedoms and recognized the right of individual petition as well as the obligatory jurisdiction of the European Court of Human Rights. Moreover, Turkey has ratified the European Convention for the Prevention of Torture and is subject to inspection by the European Committee.

8.2 The State party refers to the Committee's Views in communication No. 13/1993 (Mutombo v. Switzerland) where the fact that Zaire was not a party to the Convention formed part of the Committee's deliberations leading to the conclusion that the State party was under an obligation not to expel Mr. Mutombo to Zaire. The State party draws the Committee's attention to the serious and paradoxical consequences if the Committee were to decide that the return of the author to Turkey would constitute a violation of article 3 of the Convention by Switzerland, bearing in mind that Turkey is not only a party to the Convention but also has accepted the Committee's competence to examine individual complaints.

Counsel's comments

9.1 By submission of 10 November 1995, counsel states that, on 6 December 1994, the author wrote a letter to the Prosecutor in Izmir to ask him for a copy of his record. He has received no reply, but in January 1995 the police came to see the author's former neighbours in Izmir and enquired after him. According to counsel, this shows that the police in Turkey are still looking for the author. Counsel doubts therefore the information given by the Swiss embassy in Ankara according to which the author is not listed by the police.

9.2 Counsel acknowledges that the Swiss authorities have examined the author's file in a detailed manner, but contends that its examination lacked depth and that the evidence in favour of the author has not been properly evaluated. In this connection, counsel claims that the State party appreciates more the information acquired by its own mission in Turkey than the information provided by the author. Counsel does not deny the contradictions and inconsistencies in the author's story but submits that the Swiss authorities never took into account the effect of torture on the author's memory and ability to concentrate. Counsel adds

that the hearings in themselves create considerable stress leading to mistakes and that only in rare cases refugee claimants do not contradict themselves during the procedure. Moreover, counsel questions the seriousness of the contradictions and their relevance to the heart of the author's claim.

9.3 As regards the meeting with the member of parliament, counsel recalls that the parliamentarian confirmed this meeting in a letter and that he has explained that he was caught by surprise by the phone call from the Swiss embassy, which interrupted him in his work.

9.4 Counsel rejects the State party's suggestion that the lawyer in Turkey wrote his letter as a favour to the author and points out that a copy of the authorization to represent the author's wife was enclosed. Counsel submits that the written document submitted by the author should carry more weight than a report based on a telephone conversation, during which misunderstandings may have occurred.

9.5 Counsel maintains that the author would be in danger if returned to Turkey and denies that he could seek refuge in another part of the country. In this connection, counsel submits that the situation continues to deteriorate and that the author has already had to flee Izmir, and that his wife, who resettled in Bursa, has again seen the situation deteriorate there. Counsel claims that not only listed persons run the risk of being arrested, but that large groups are being threatened with arrest, especially young people and those who originally come from Tunceli. According to counsel, it is no longer possible to avoid places at risk.

9.6 Counsel does not deny that the Swiss authorities take the situation in Turkey into due account when deciding refugee claims by Kurds, as is shown by the fact that 50% of the refugee claimants from Turkey are granted asylum and that another 25% are provisionally allowed to stay in Switzerland. In the instant case, however, counsel claims that the author's file was not examined with the requisite objectivity.

9.7 Counsel submits that, despite the fact that Turkey has ratified the Convention against Torture, it has never actually tried to combat torture, which is still common practice in the country. Counsel states that more and more persons disappear in detention and that hardly any action is taken against alleged torturers. Counsel doubts whether, in these circumstances, the ratification of the Convention can be used against the author's claim that he fears torture. Counsel argues that the mere fact that a country has ratified the Convention does not discharge a State party from its obligations under article 3 to determine whether substantial grounds exist for believing that a person would be in danger of being subjected to torture in that country. In this connection, counsel argues that the factual situation in a country, and not only its international obligations, should be taken into account.

Decision on admissibility and examination of the merits

10. 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 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 notes that the State party has not raised any objections to the admissibility of the communication and that it has provided the Committee with its observations concerning the merits of the communication. The Committee finds therefore that no obstacles to the admissibility of the communication exist and proceeds with the consideration of the merits of the communication.

11.1 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

11.2 Pursuant to paragraph 1 of article 3, the Committee must decide whether there are substantial grounds for believing that Mr. Alan would be in danger of being subject to torture upon return to Turkey. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, 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 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 person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate 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 specific circumstances.

11.3 In the instant case, the Committee considers that the author's ethnic background, his alleged political affiliation, his history of detention, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.

11.4 The Committee has noted the State party's argument that the author has invoked the general situation of Kurds in Turkey to substantiate his fears of torture, but that he has failed to demonstrate that he personally risks to be subject to torture. The Committee has also noted the State party's statement that, according to information collected by its embassy in Ankara, the author is no longer sought by the police and that no prohibition of a passport is in force for him. On the other hand, the author's counsel has stated that, according to the author's wife, his house in Izmir had been under constant surveillance by the police, also after his departure, and that, in January 1995, the police questioned his former neighbours about the author. Furthermore, since the author left, his brother has been arrested on more than one occasion and his native village was demolished. As regards the State party's argument that

the author could find a safe area elsewhere in Turkey, the Committee notes that the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a "safe" area for him exists in Turkey. In the circumstances, the Committee finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if returned to Turkey.

11.5 Finally, the Committee has taken note of the State party's argument that Turkey is a party to the Convention against Torture and has recognized the Committee's competence under article 22 of the Convention to receive and examine individual communications. The Committee regrettably notes, however, that practice of torture is still systematic in Turkey, as attested to in the Committee's findings in its inquiry under article 20 of the Convention. 1/ The Committee observes that the main aim and purpose of the Convention is to prevent torture, not to redress torture once it has occurred, and finds that the fact that Turkey is a party to the Convention and has recognized the Committee's competence under article 22, does not, in the circumstances of the instant case, constitute a sufficient guarantee for the author's security.

11.6 The Committee concludes that the expulsion or return of the author to Turkey in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

12. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning Ismail Alan to Turkey.

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

Footnotes

*/ Made public by decision of the Committee against Torture.

1/ Published in the Committee's report to the General Assembly at its 48th session, document No. A/48/44/Add.1.