

COMMITTEE AGAINST TORTURE

S. S. and S. A. v. The Netherlands

Communication No. 142/1999

11 May 2001

VIEWS

*Submitted by: S.S. and S.A. (names withheld)
[represented by counsel]*

Alleged victim: The authors

State party: The Netherlands

Date of communication: 12 July 1999

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

Meeting on 11 May 2001,

Having concluded its consideration of communication No. 142/1999, 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 authors of the communication are Mr. S. S., a Sri Lankan national born on 1 April 1963, his wife Mrs. S. A., a Sri Lankan national born on 28 August 1972, and their daughter, B. S., born on 12 October 1997 in the Netherlands. The authors, all currently residing in the Netherlands, allege that their proposed expulsion to Sri Lanka would violate article 3 of the Convention. The authors are 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 18 August 1999. At the same time, the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the

authors to Sri Lanka while their communication was under consideration by the Committee. In a submission dated 28 October 1999, the State party informed the Committee that authors would not be returned to Sri Lanka while their case was under consideration by the Committee.

The facts as submitted by the authors

2.1 As to Mr. S. S., a member of the Tamil ethnic group, it is stated that he was held in detention by the Tamil Tiger organization LTTE from 10 January 1995 until 30 September 1995 for having publicly criticized the organization and its leader, and refusing to take part in its activities. During the period of detention, he performed tasks such as wood cutting, filling sandbags, digging bunkers and cooking. Before he was detained by LTTE, his father had been detained in his place and he had died in detention of a heart attack. On 30 September 1995, Mr. S. S. escaped from the LTTE barracks and travelled to Colombo.

2.2 On 3 October 1995, he was arrested by police, during a routine check, for inability to show an identity card. He was questioned as to personal details and whether he was involved with LTTE, which he denied. He claims not to have been believed and to have been accused of spying for LTTE and travelling to Colombo to plan an attack. The next day he was released upon the intervention of an uncle and payment of a sum of money, subject to an obligation to report daily to police while staying in Colombo. The author states that he heard that the authorities intended to transfer him to Boosa prison, from which allegedly detainees never emerge alive. On 8 October 1995, Mr. S. S. left the country by air for the Netherlands.

2.3 On 18 December 1995, Mr. S. S.'s request for asylum of 19 October 1995 was denied. An appeal made to the Secretary of Justice on 23 January 1996 was rejected on 16 September 1996. The Secretary's decision was appealed on 30 October 1996, but before the case was brought for hearing Mr. S. S. was informed that the decision of 16 September 1996 was withdrawn. A new decision would be taken after his case had been heard by an independent Advisory Commission on Aliens Affairs (Adviescommissie voor vreemdelingszaken).

2.4 As to Mrs. S. A., also a member of the Tamil ethnic group, it is contended that in mid-November 1995 she was also detained by LTTE in an attempt to determine her husband's whereabouts and activities. While in the LTTE camp, she was forced to perform duties such as cooking and cleaning. After being taken to hospital at the end of March 1996, she escaped on 3 April 1996.

2.5 On 17 June 1996, she was arrested by the Eelam People's Revolutionary Liberation Front (EPRLF). She states that she was accused by a third party of collaboration with LTTE and was repeatedly questioned in this regard by EPRLF, but explained that she had performed forced labour for LTTE and why. She states she was not ill-treated but occasionally struck. She was handed over to the Sri Lankan authorities, held in custody and made to identify various alleged LTTE members at roadblocks. In mid-August 1996, she was able to escape after a convoy in which she was travelling struck a mine. She travelled to Colombo in late August and left the country by air for the Netherlands on 12 September 1996. It is alleged, without any details being provided, that because of her escape her uncle was killed by the authorities.

2.6 On 18 November 1996, Mrs. S. A.'s request for asylum of 16 October 1996 was denied. An appeal made to the Secretary of Justice on 31 December 1996 was rejected on 20 March 1997. The following day Mrs. S. A. was informed that the decision was withdrawn and that a new decision would be taken after hearing before the Advisory Commission.

2.7 Mr. S. S. and Mrs. S. A. were both heard before the three-person Advisory Commission on 2 February 1998 which, in an extensive and fully reasoned judgement, unanimously recommended that the Secretary of Justice reject the authors' appeal against the original denial of asylum.¹ On 30 June 1998, the Secretary of Justice ruled that the authors were not eligible for refugee status and that they were in no real danger of being subjected to inhuman treatment. On 23 July 1998, the authors appealed this decision to The Hague District Court, which found the appeals unfounded on 25 January 1999.

The complaint

3. The authors contend that there are substantial grounds to believe that, if returned, they will be subjected to torture. They state that, as Tamils from the northern Tamil town of Jaffna, their presence in Colombo will give rise to suspicions on the part of the authorities of connections to LTTE. Having been suspected of such connections already, there is said to be nowhere safe in Sri Lanka where they could go. They contend that the authorities profoundly believe them to be opponents of the regime. Citing unspecified reports on the general situation in Sri Lanka by Amnesty International, UNHCR and other sources, the authors claim a real risk of being detained and tortured in the event of their return. Accordingly, their forced return is claimed to violate article 3 of the Convention.

Observations of the State party

4.1 As to the admissibility of the communication, by letter of 28 October 1999, the State party accepts that there are no further avenues of appeal available against the decision of the District Court and that accordingly it is not aware of any objections to the admissibility of the communication.

4.2 As to the merits, by letter of 18 February 2000, the State party argues that, taking into account the observations made by the authors during their asylum procedure viewed in the light of the general situation in Sri Lanka, there is no reason to assume that substantial grounds exist for believing that the authors would run a real and personal risk of being subjected to torture if returned. Accordingly it considers the communication ill-founded.

4.3 The State party notes at the outset that under its law, due to a high population density and consequent problems, aliens are admitted only if its international obligations, essential Dutch interests or compelling humanitarian reasons require it. The process governing asylum is that the applicant is interviewed twice after submitting an application, by the Immigration and Naturalization Service (INS), if necessary with interpreters. Applicants may avail themselves of legal assistance at both interviews. Written reports are drawn up upon which the applicant may comment and submit corrections and additions. In reaching a decision, INS is assisted by country reports issued by the Ministry of Foreign Affairs, which draws on NGO sources and reports from Dutch missions. If an objection to a decision is rejected, the Advisory Commission is consulted in cases concerning a fear

of persecution. The Commission hears the applicant, invites UNHCR to comment, and makes a recommendation to the Secretary of Justice. A final appeal from the Secretary's decision is possible to the District Court (Arrondissementsrechtbank). Legal aid is available throughout the appeal procedure.

4.4 The State party then goes on to set out its understanding of the general human rights situation in Sri Lanka, based on the relevant November 1998 country report issued by the Ministry of Foreign Affairs. The report notes areas of instability and human rights violations in the conflict areas, including brief detentions of many Tamils. However, it is the a view of the State party and other European Union member States that the situation in Government-controlled areas is not such that the return to these areas of persons whose cases have carefully been considered would, by definition, be irresponsible. The State party emphasizes that the Tamil human rights situation is taken into account by the Secretary of Justice in each individual case, as it is in the District Court's reviews of those decisions.

4.5 In a series of decisions, the District Court has held the Secretary to have acted "in all reasonableness" in judging that the overall situation in Sri Lanka no longer entails particular hardship for returnees. Regarding torture in particular, the Court has held that, even assuming severely under-reported data on torture cases in the Ministry's report, there would be no significant grounds to conclude that the likelihood of torture of Tamils in Colombo who belong to "high risk" groups (such as young unidentified men) is so great in general that the group as a whole runs a substantial risk of being so exposed.

4.6 The report notes that all relatively young Tamils who speak little Sinhalese and whose documents show them as coming from the north stand a chance of being held for questioning following an identity check. This is particularly so if one has recently arrived in Colombo from a war zone and has no identity documents or valid reason for being in Colombo, or has failed to register upon arrival. The majority are released within 48-72 hours once their identity is established and their reasons for being in Colombo have been explained. Those held longer may be subjected to rougher treatment, while those held for more than a week on suspicion of LTTE involvement face a higher risk of ill-treatment. Persons held for more than three months on firm evidence of involvement face a high risk of torture.

4.7 Accordingly, the State party argues that the situation in Sri Lanka is not such that for Tamils in general (in particular young men), even if they are (or have recently come) from the north, substantial grounds exist for believing that they risk torture if returned. In this regard, the State party further points to the District Court's consideration of the Ministry of Foreign Affairs country report and the wide variety of other sources, as well as the State party's willingness to have the Committee assist in putting an end to violations of the Convention, which was demonstrated at the consideration of its last periodic report.

4.8 Turning to the individual cases, the State party points out, in respect of Mr. S. S., that his arrest in Colombo was for failure to identify himself during a routine check. It is relevant that several others were arrested at the same time, and the arrest cannot be regarded as an act specifically directed against the author. Mr. S. S.'s subsequent release, apparently to do as he pleased, further speaks against the authorities taking a particular interest in him. As to the obligation to report daily,

the State party refers to its Ministry of Foreign Affairs country report explaining that an obligation to report after release does not signify that the person should be classified as wanted by the police, nor does a failure to comply with this obligation automatically mean that the person's name is placed on a list of serious suspects. In this case, the fact that Mr. S. S. was under an obligation to report would not put him at increased risk in the event of a return.

4.9 Additionally, the State party notes that Mr. S. S's statement that he was on a transfer list for Boosa prison is based entirely on uncorroborated suspicions. In any event, given that he was released after a day, it is implausible that his name was on that list. Furthermore, if the author believed that he was under close surveillance by the Sri Lankan authorities for suspected LTTE activities, it is hard to see why he was willing to take a considerable risk by leaving the country from Colombo airport. The author's statements on the fate of his father also are inconsistent. Contrary to the account presented in the communication and at the first interview that his father had died in captivity of a heart attack, the author stated subsequent to the second interview that his father had been held at an earlier point by LTTE for a week and had been released upon suffering a minor heart attack.

4.10 As to Mrs. S. A.'s position, the State party also argues that her account contains no indication that she would be at any greater risk than other Tamils upon returning to Sri Lanka. Regarding her arrest by and possible suspicion of involvement with LTTE, the State party points out that it is important that her work was performed under duress. She cannot be regarded as any kind of LTTE activist, and the activities she performed were in the service sphere. In the view of her background and experience, the State party does not consider it plausible that the Sri Lankan authorities would consider her a valuable informant, and in this respect she is no different from many other Sri Lankan Tamil who at some time had been detained in an LTTE camp.

4.11 The author's contention that the Sri Lankan authorities took an increased interest in her is also not supported by the fact that she left the country in the manner easiest to control, that is from Colombo airport. Regarding her allegation that her uncle was killed by the authorities on account of her escape, the State party points out that the contention is based on hearsay. No corroboration or evidence of any kind has been furnished of any link between her escape and his death. The State party points out that the District Court's judgement of 25 January 1999 regarded Mrs. S. A.'s testimony as unreliable.

4.12 The State party refers to the Committee's jurisprudence that, even assuming the existence of a gross pattern of serious violations, additional grounds must be shown why an individual would personally be at risk of torture upon return to a country.ⁱⁱ Moreover, "substantial grounds" for apprehending such a fate must go beyond a mere possibility or suspicion of torture.ⁱⁱⁱ Applying these tests to the instant case, the State party argues, regarding the inconsistencies outlined above, that the authors have failed to argue convincingly that there are substantial grounds for fearing a "foreseeable, real and personal risk" of torture in their cases. The authors have not satisfactorily established that they are at greater risk than other Tamils resident in Colombo. They have never put themselves forward as opponents of the Sri Lankan authorities, nor have they belonged to a political party or movement. Nor do their accounts suggest close relatives have been active, politically or otherwise, and have therefore attracted the attention of the Sri Lankan authorities. The activities that the authors profess to have performed under duress for LTTE are trivial in nature and extent.

Additional observations by the author

5.1 By letter of 10 April 2000, the authors restate their contention that they have demonstrated substantial grounds for believing that they are at personal risk of torture, thereby putting the State party in breach of article 3 of the Convention in the event of a return.

5.2 The authors claim that both parents left the country, separately, on false passports and therefore did not experience any problems in leaving. They contest the State party's claim that the authorities impute no political involvement to them, stating that while they were not officially members of any group, both were suspected of connections to LTTE. Mr. S. S. was suspected of spying for LTTE and being in Colombo with ill intentions, while Mrs. S. A. was accused of working for LTTE and employed to identify LTTE members at roadblocks. In this regard, the authors contend that the Ministry of Foreign Affairs report ascribes a risk of being held for more than a week to Tamils suspected of having knowledge of LTTE.

5.3 As to Mr. S. S.'s account, the authors reject the State party's assertion that, upon Mr. S. S.'s release from police custody, he was free to do as he pleased and that they had no special interest in him; how could this be the case if he had to report to the police daily? The authors reject the State party's classification, in the absence of proof, of Mr. S. S.'s placement on the Boosa transfer list as "implausible", claiming that such a conclusion does not follow simply from being released after a day. Nor, claim the authors, had Mr. S. S.'s statements during the asylum procedure previously been doubted or considered implausible, nor had there been a request for further information on this aspect. There was therefore no reason to doubt this particular important statement. Similarly, simply because the account of the death of Mr. S. S.'s father was perhaps mistakenly transcribed did not make the statement unreliable.

5.4 As to Mrs. S. A.'s account, the authors wish to underline that she had told the authorities that she had been forced to work for LTTE, and the State party's statement that she cannot be regarded as an LTTE activist cannot be substantiated. The State party allegedly ignores her use as an informer to denounce alleged LTTE members. Concerning her uncle's death, the authors claim that, while unable to produce a death certificate, there is no reason to doubt the information. The District Court's judgement on witness credibility is no reason to doubt her statements, which the authors contend had never been doubted by the State party. Therefore, Mrs. S. A. ought to be given the benefit of the doubt on this issue.

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 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 also notes that all domestic remedies have been exhausted, and that all other admissibility requirements have been met. Accordingly, the Committee considers the communication admissible. Since both the State party and the author have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the expulsion of the authors to Sri Lanka would violate the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the authors would be in danger of being subjected to torture if returned to Sri Lanka. In reaching this decision, it must take into account all relevant considerations, pursuant to article 3, paragraph 2, 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 individuals concerned would be personally at risk of being subjected to torture. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country does not by itself constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon returning to that country; there must be other grounds indicating that he or she 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 in danger of torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3, which reads:

“Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (A/53/44, annex IX, para. 6).

6.5 In the present case, the Committee notes that the authors were provided with a comprehensive examination of their claims, with multiple opportunities to contribute to and correct the formal record, with an investigation by an independent advisory commission as well as judicial review. The Committee notes the attention drawn by the State party to the determinations of its various authorities of a number of inconsistencies and contradictions in the authors' accounts, casting doubt on the veracity of the allegations. It also notes the explanations provided by the authors in that respect.

6.6 The Committee finds that the authors have failed to show significant grounds that the evaluation of the State party's authorities was arbitrary or otherwise unreasonable, in concluding generally that the likelihood of torture of Tamils in Colombo who belong to a “high risk” group is not so great that the group as a whole runs a substantial risk of being so exposed. Nor have they demonstrated any inaccuracy in the State party's conclusion that the situation in Sri Lanka is not such that for Tamils in general, even if they are from the north of the country, substantial grounds exist for believing that they risk torture if returned from abroad.

6.7 As to the authors' individual circumstances, the Committee considers that the respective detentions suffered by the authors do not distinguish the authors' cases from those of many other Tamils having undergone similar experiences, and in particular they do not demonstrate that the

respective detentions were accompanied by torture or other circumstances which would give rise to a real fear of torture in the future. In the circumstances, the Committee considers that the authors have failed to demonstrate, generally, that their membership of a particular group, and/or, specifically, that their individual circumstances give rise to a personal, real and foreseeable risk of being tortured if returned to Sri Lanka at this time.

6.8 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 authors' removal from the State party would not constitute a breach of article 3 of the Convention.

Notes

ⁱ UNHCR did not take up an invitation from the Advisory Commission to make representations on behalf of the authors in this case.

ⁱⁱ A.D.D. v. The Netherlands (communication No. 96/1997).

ⁱⁱⁱ E.A. v. Switzerland (communication No. 28/1995).